TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted]29

THE UNITED STATES, PETITIONER,

vs.

WILLIAM B. POLAND AND FREDERICK WILLIAM LOW.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 31, 1917.
CERTIORARI AND RETURN FILED MAY 15, 1917.

(25845)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 450.

THE UNITED STATES, PETITIONER,

vs.

WILLIAM B. POLAND AND FREDERICK WILLIAM LOW.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA, APPELLANT. vs. WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees.	No. 2621.

Transcript of record. Upon appeal from the United States District Court for the District of Alaska, Division No. 3.

1 *Names and addresses of attorneys of record.*

William N. Spence, United States attorney, and his assistant, William A. Munly, Valdez, Alaska, attorneys for plaintiff and plaintiff in error.

S. O. Morford, Seward, Alaska, attorney for the defendant and defendant in error. [1*]

In the District Court for the District of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFFS, vs. WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants.	#593.

Application for leave to file amended complaint.

Comes now the plaintiffs and make application to the court for leave to file the amended complaint tendered herewith in the above-entitled cause.

G. B. BRUBAKER,
Assistant United States Attorney.

Due service of the foregoing motion, by receipt of a copy thereof, is hereby acknowledged at Seward, Alaska, this 15th day of October, 1914.

S. O. MORFORD,
Attorney for Defendants.

2 (Endorsed:) Filed in the district court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, clerk. By T. P. Geraghty, deputy. [2–3]

*Page number appearing at foot of page of original certified transcript of record.

In the District Court for the Territory of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Order granting leave to file amended complaint.

This cause coming on for hearing this day, on the application of the plaintiffs for leave to file the amended complaint tendered with said application, G. B. Brubaker, assistant United States attorney, appearing on behalf of the plaintiffs, and the defendants appearing by their attorney, S. O. Morford, Esq., good cause appearing therefore:

It is hereby ordered that plaintiffs be, and they are hereby, granted leave to file said amended complaint.

And it further ordered that the defendants have forty days from the date of the service of said amended complaint within which to answer the same.

Done in open court this 15th day of October, 1914.

FRED M. BROWN,
District Judge.

3 To which order defendant excepts, and exception is allowed.

FRED M. BROWN,
District Judge.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, clerk. By T. P. Geraghty, deputy.

Entered: Court Journal S-1, page 319. [4]

In the District Court for the District of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } In Equity.

Amended complaint.

Come now the above-named plaintiffs, the United States of America, by and through William N. Spence, United States attorney for the Third Division of the District of Alaska, acting under authority and by direction of the Attorney General of the United States, and for cause of action against the above-named defendants alleges:

I.

That heretofore, to wit, on or about the 6th day of September, 1905, the above-named defendant, William B. Poland, entered

upon and took possession of the land hereinafter described, said land being then and there part of the public lands and public domain of the United States, with the purpose and intent of acquiring title thereto as the assignee of certain soldier's additional homestead entry rights, pursuant to section 2306 of the Revised Statutes of the United States and acts amendatory thereto, and caused an official survey thereof to be made, whereby said land was surveyed in the form of two tracts or parcels of land: that said land, entered and surveyed as aforesaid, is in the Kenai Recording Precinct, District of Alaska, and more particularly bounded and described as follows: [5]

United States Survey No. 241.

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees seven minutes north, longitude one hundred and forty-nine degrees seven minutes west, said point being marked by an iron pin three inches in diameter, marked "S. 241, cor. No. 1"; thence south sixty-one degrees thirty-seven minutes west two and sixty-one-hundredths chains; thence south seventy-eight degrees west nineteen and ten-hundredths chains; thence south fifty-two degrees fifteen minutes west ten chains; thence south seventy-one degrees fifty minutes west three chains; thence south thirty-one degrees twenty-seven minutes west three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. 241, cor. No. 2"; thence west six and fifty-nine hundredths chains to corner No. 3, which corner is marked by an iron pipe three inches in diameter, marked "S. 241, cor. No. 3"; thence north forty-seven and eighty-eight-hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter, marked "S. 241, cor. No. 4"; thence east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 5"; thence south thirty-two and eighty-eight-hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five one-hundredths acres, being the land embraced in United States Survey No. 241, according to the official plat of said survey returned to the General Land Office by the Surveyor General, and:

United States survey No. 242.

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2; thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east 40 chains to corner No. 4, an iron pipe three inches in diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1,

the place of beginning, containing one hundred and sixty acres,
6 being the land embraced within United States survey No. 242, according to the official plat of said survey returned to the General Land Office by the Surveyor General.

That the land embraced within said survey constitutes and is a single body of land, containing 319.75 acres.

II.

That thereafter, to wit, on the 26th day of April, 1906, the said William B. Poland filed in the United States land office, at Juneau, Alaska, two applications [6] whereby he, as the assignee of certain soldier's additional homestead entry rights applied under section 2306 of the Revised Statutes of the United States to enter the land above described, one of said applications covering the entry embraced in said survey No. 241 and the other application covering the land embraced in said survey No. 242.

III.

That thereafter, to wit, on the 29th day of January, 1908, the requisite proofs having been made, a patent for the land embraced in said survey No. 241 was issued to the said William B. Poland, a copy of which patent is hereto attached, marked Exhibit "A," and made a part hereof.

IV.

That, on the 30th day of July, 1906, the defendant, William B. Poland, filed or caused to be filed in the United States land office at Juneau, Alaska, in support of his said application for a patent
7 to the land embraced in said survey No. 242, an affidavit, subscribed and sworn to by H. E. Revell and Frank Ballaine, which affidavit contained the following false statement:

"Said tract of land (referring to the land embraced in said survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than eighty rods distant from any other survey or entry under the provisions of said act of May 14th, 1898," the act referred to in said statement being act of Congress entitled "An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898, as amended by the act of Congress entitled "An act to amend [7] section one of the act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled 'An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska,'" approved March 3, 1903.

That said statement was and is false in this, that said tract of land referred to in said affidavit was not more than eighty rods distant

from any other survey or entry under the provisions of said act of May 14th, 1898, as then amended, but was adjoining and contiguous to that certain tract of land embraced within said survey No. 241, upon which a soldier's additional homestead entry and survey had been theretofore made by the said William B. Poland as here-
8 inbefore set forth, and was part and parcel of a single body of land containing more than one hundred and sixty acres, to wit, 319.75 acres, entered by soldier's additional homestead entry rights under said act of May 14th, 1898, as amended, said single body of land being the land embraced within said surveys No. 241 and No. 242.

That by means of said false affidavit filed as aforesaid the said from the officials of the land Department of the United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier's additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed.

V.

That by means of said false affidavit filed as aforesaid the said defendant, William B. Poland, knowingly, falsely, and fraudulently represented to plaintiffs and to the officials of the Land Department of the United States, whose duty it was to pass upon said application, that no land in excess of one hundred and sixty acres in a single [8] body in Alaska was entered and applied for by soldier's additional homestead rights under said application, whereas in truth and in fact land in excess of one hundred and sixty acres in a single body in Alaska was thereby entered and applied for under soldier's additional homestead rights, which fact the said defendant, William B. Poland, then and there well knew; that the said defendant, William B. Poland, caused said false affidavit to be filed as aforesaid and
9 said false and fraudulent representations to be made by means thereof, with the intent and for the purpose of deceiving said officials of the Land Department of the United States and leading them erroneously to believe that the land embraced within said survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and to induce said officials to cause a patent to issue therefor, and with the further intent to defraud plaintiffs and unlawfully to deprive plaintiffs of the use and enjoyment of said land embraced in said survey No. 242.

VI.

That the Assistant Commissioner of the General Land Office of the United States, relying upon the aforesaid false and fraudulent representations and believing them to be true and being induced thereby so to do, in the erroneous and mistaken belief that the land

embraced within said survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and that the defendant, William B. Poland, was lawfully entitled to a patent thereto, mistakenly, erroneously, without authority, and in violation of law, and without jurisdiction so to do, approved said entry and application for a patent to the land embraced in said survey No. 242; and thereafter, to wit [9], on the 22d day of March, 1909, the President of the United States, likewise relying upon and being likewise deceived and induced by said false and fraudulent representations, under the same misapprehension as to the law and the facts, mistakenly, erroneously, without authority, and in violation of law, and without jurisdiction so to do, caused to be signed, executed, and delivered to the said defendant, William B. Poland, a patent to the land embraced within said survey No. 242, a copy of which patent is hereto attached, marked Exhibit "B," and made a part hereof.

10

VII.

That Congress passed an act approved March 3, 1903, entitled "An act to amend section one of the act of Congress approved May 14, 1898, entitled 'An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska,'" which, among other things, provides that no more than one hundred and sixty acres shall be entered in any single body by soldier's additional homestead right.

That the land embraced within said survey No. 242 was by the provision of the act of Congress above mentioned reserved from entry and patent under soldier's additional homestead right by virtue of the soldier's additional homestead entry theretofore made by the said defendant, William B. Poland, upon the land embraced within said survey No. 241; that by force of the foregoing the patent issued to the said defendant, William B. Poland, for the land embraced within said survey No. 242 was and is null and void for the reason that more than one hundred and sixty acres of land in a [10] single body entered by soldier's additional homestead rights was thereby attempted to be granted to the defendant William B. Poland.

11

VIII.

That thereafter, to wit, on the 25th day of May, 1909, the said William B. Poland made, executed, and delivered to the above-named defendant, Frederick William Low, a deed, wherein and whereby he conveyed, bargained, sold, and confirmed unto the said Frederick William Low, and to his heirs and assigns forever, the land hereinbefore described, and covenanting to and with the said Low to warrant and defend the same against any and all persons claiming or to claim title thereto; a copy of which deed is hereto attached, marked exhibit "C," and made a part hereof.

IX.

That the land embraced within said survey No. 242 during all the times hereinbefore mentioned was and now is public land and part of the public domain of the United States, and the said United States have been at all times, and now are, entitled to the immediate possession thereof; that the aforesaid patent to the land embraced within said survey No. 242 and the deed hereinbefore mentioned, in so far as said deed refers to the land embraced within said survey No. 242 are, and each of them is, a cloud upon plaintiffs' title to said land.

X.

That plaintiffs have no plain, speedy, or adequate remedy at law.

Wherefore, plaintiffs pray that said patent for the land embraced within said survey No. 242 be vacated, cancelled, and declared
12 to be null and void, and that said [11] deed from the defendant William B. Poland to Frederick William Low, in so far as the same refers to the land embraced within said survey No. 242, be vacated, cancelled, and declared to be null and void; that plaintiffs have and recover from the defendants their costs and disbursements herein and for such further relief as to the court may seem just and equitable in the premises.

WILLIAM X. SPENCE,
United States Attorney for the Third Division of the District of Alaska.
GUY B. BRUBAKER,
Assistant United States Atty.

UNITED STATES OF AMERICA,
District of Alaska, Third Division, ss:

Guy B. Brubaker, being first duly sworn, upon oath deposes and says: That he is the assistant United States attorney for the third division, Territory of Alaska, and attorney for the plaintiffs in the foregoing cause; that he makes this verification for and on behalf of said plaintiffs; that the foregoing amended complaint is signed by him in his own proper handwriting; that he has read the same; has knowledge of all the material allegations therein set forth; and that he believes the same to be true.

G. B. BRUBAKER.

Subscribed and sworn to before me this 15 day of October, *September*, 1914.

[SEAL.]

WM. H. WHITTLESEY,
Notary Public for Alaska.

13 Filed in the District Court, Territory of Alaska, third division. Oct. 15, 1914. Arthur Lang, clerk. By T. P. Geraghty, deputy. [12]

Exhibit "A" [to amended complaint].

The United States of America to all to whom these presents shall come, greeting:

Homestead certificate No. 80. Application 80.

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Juneau, Alaska, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, including the act of March 3, 1891 (26 Statutes, 1099), and the act of May 14, 1898 (30 Statutes, 409), the claim of William B. Poland, assignee of William F. Isbell and Edward McArdle, has been established and duly consummated in conformity to law, for the lands embraced in U. S. Survey No. 241, situated on the shore of Resurrection Bay, Alaska, more particularly bounded and described as follows, with magnetic variation twenty-seven degrees, two minutes east:

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees seven minutes north, longitude one hundred forty-nine degrees seven minutes west, said point being marked by an iron pin three inches in diameter, marked "S. 241, cor. No. 1,"
14 thence south sixty-one degrees thirty-seven minutes west two and sixty-two-hundredths chains; thence south seventy-eight degrees, west nineteen and ten-hundredths chains; thence south fifty-two degrees fifteen minutes west ten chains; thence south seventy-one degrees fifty minutes west three chains; thence south thirty-one degrees twenty-seven minutes west three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. 241 cor. No. 2"; thence west six and fifty-nine-hundredths chains to corner No. 3, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 3"; thence north forty-seven and eighty-eight-hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter, marked "S. 241, cor. No. 4"; thence east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 5"; thence south thirty-two and eighty-eight-hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five-hundredths acres.

Now know ye, that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant, unto the said William B. Poland, and to his heirs the lands above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature hereunto belonging, unto the said William B. Poland and to his heirs and assigns forever. And there is
15 reserved, from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of

the United States and a roadway sixty feet in width parallel to the shore line as near as may be practicable [13] shall be reserved for the use of the public as a highway. And reserving to the United States the right to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all waters of the lands hereby granted, and ingress and egress are reserved to the public on the waters of all streams, whether navigable or otherwise.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth day of January, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-second.

By the President.

THEODORE ROOSEVELT.

By H. W. SANFORD,

Recorder of the General Land Office. [14]

16 *Exhibit "B" [to amended complaint].*

The United States of America to all to whom these presents shall come, greeting:

Juneau 0289. Homestead Certificate No. —. Application.

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Juneau, Alaska, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of William B. Poland, assignee of Harold M. Fay, minor orphan child of Clinton B. Fay by Ida L. Fay, guardian, and Wyllis S. Walkley, has been established and duly consummated, in conformity to law, for the lands embraced in U. S. Survey No. 242, more particularly bounded and described as follows: Beginning at corner No. 1, near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked "S. 242, cor. No. 1"; thence west forty chains to corner No. 2, an iron pipe three inches in diameter, marked "S. 242, cor. No. 2," thence north forty chains to corner No. 3, an iron pipe three inches in diameter marked "S. 242, cor. No. 3," thence east 40 chains to corner No. 4, an iron pipe three inches in diameter marked "S. 242, cor. No. 4," thence south 40 chains to corner No. 1, the place of beginning,

17 in the District of Alaska, containing one hundred sixty acres, according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General.

Now know ye that there is therefore granted by the United States unto the said William B. Poland the tract of land above described; to have and to hold the said tract of land, with the appurtenances

thereof, until the said William B. Poland and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof I, William H. Taft, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-second day of March in the year of our Lord one thousand nine
18 hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

By the President:

[SEAL.] WM. H. TAFT.

By M. W. YOUNG, *Secretary.*

H. W. SANFORD,

Recorder of the General Land Office. [15]

Demurrer [of William B. Poland et al. to amended complaint].

This indenture, made this 25th day of May, A. D. 1909, between Wm. B. Poland, a bachelor, by Francis H. Stewart, his attorney in fact, under power of attorney, the party of the first part, and Frederick William Low, of the city of Seattle, county of King, and State of Washington, party of the second part:

Witnesseth, That the said party of the first part, for and in consideration of the sum of one ($1.00) dollar gold coin of the United States of America, to him in hand paid by the said party of the second part, and other good and valuable considerations, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns, that parcel or parcels of land situated and being at the head of Resurrection Bay, in the Territory of Alaska, covered by United States official surveys No. 241 and 242 and patents from the United States Government for same, described as follows, with magnetic variation twenty-seven degrees and two minutes east, U. S. Survey No. 241:

19 Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees seven minutes north, longitude one hundred forty-nine degrees seven minutes west, said point being marked by an iron pin three inches in diameter, marked "S. 241, cor. No. 1"; thence south sixty-one degrees thirty-seven minutes west, two and sixty-one hundredths chains; thence south seventy eight degrees, west nineteen and ten hundredths chains; thence south

fifty-two degrees fifteen minutes west, ten chains; thence south seventy-one degrees fifty minutes west, three chains; thence south; thence thirty-one degrees twenty-seven minutes west, three and twenty hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. 241, cor. No. 2"; thence west six and fifty-nine hundredths chains to cor. No. 3, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 3"; thence north forty-seven and eighty-eight hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter, marked "S. 241, cor. No. 4"; thence east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 5"; thence south thirty-two and eighty-eight hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five hundredths acres:

Also the lands embraced in U. S. survey No. 242, magnetic
20 variation twenty-seven degrees and two minutes east, beginning at corner No. 1 near the north shore of Resurrection Bay, which corner is identical with corner No. 5, U. S. survey No. 241, said corner being marked by iron pipe three inches in diameter, marked "S. 242, cor. No. 1," west 40.00 chains to corner No. 2, said corner being marked by iron pipe three inches in diameter, marked "S. 242, cor. No. 2"; thence north 40.00 chains to corner No. 3, said corner being marked by iron pipe three inches in diameter, marked "S. 242, cor. No. 3"; thence east 40.00 chains to corner No. 4, said corner being marked by iron pipe three inches in diameter, marked "S. 242, cor. No. 4"; thence south 40.00 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres. [16]

Together with the appurtenances, to have and to hold the said premises with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

And the said party of the first part, his heirs, executors, and administrators, does by these presents covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that he, the said party of the first part, his heirs, executors, and administrators, all and singular, the premises hereinabove conveyed, described, and granted or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

21 In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM B. POLAND. [SEAL.]
By FRANCIS H. STEWART. [SEAL.]
His Attorney in Fact.

Signed, sealed, and delivered in presence of
G. S. SCHOFIELD,
GEORGE P. BAGG.

STATE OF NEW YORK, } ss.
County of New York, }

This is to certify that on this 25th day of May, A. D. 1909, before me, the undersigned, a notary public in and for the county of New York, and State of New York, duly commissioned and sworn, personally came Francis H. Stewart to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed as the agent and attorney in fact for and on behalf of William B. Poland, bachelor, and for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

LETITIA M. HODGINS,
Notary Public in and for New York County, New York.

STATE OF NEW YORK, } ss.
County of New York, }

I, Peter J. Dooling, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that Letitia M. Hodgins, whose name is subscribed to the certificate of the proof or the acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the county of New York, dwelling in the said county, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court and county, the 28th day of May, 1909.

PETER J. DOOLING, *Clerk.*
[SEAL.]

The foregoing instrument filed for record NOV. 18, 1909, at 11 a. m. by request S. O. Morford.

J. J. FINNEGAN,
District Recorder. C. [17].

Due service of the foregoing amended complaint is hereby acknowledged.

At Seward, Alaska, this 15th day of October, 1914.

S. O. MORFORD,
Attorney for Defendants. [18.]

23 In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.	No. 593.

Demurrer.

Come now the defendants, William B. Poland and Frederick William Low, by their attorney, and demur to plaintiff's amended complaint on file herein, and for cause of demurrer state that said amended complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them, either in law or equity.

S. O. MORFORD,
Attorney for Defendants.

Service of copy accepted this 24 day of November, A. D. 1914.

WM H. WHITTLESEY,
Asst. U. S. Attorney.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. Dec. 23, 1914. Arthur Lang, clerk. By T. P. Geraghty, Deputy. [19]

24 In the District Court for the District of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.	No. 593.

Demurrer of Defendant Frederick William Low [to amended complaint].

Comes now Frederick William Low, one of the defendants above named, by his attorneys, Ira Bronson and S. O. Morford, and demurs to the amended complaint of the plaintiff herein on the ground that said complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiffs to any relief in equity against this defendant.

S. O. MORFORD AND IRA BRONSON,
Attorneys for Defendant, Frederick William Low.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1915. Arthur Lang, clerk. By T. P. Geraghty, Deputy. [20]

25 In the District Court for the District of Alaska, division number three.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Demurrer of defendant, William B. Poland [to amended complaint].

Comes now William B. Poland, one of the defendants above named, by his attorneys, S. O. Morford and Ira Bronson, and demures to plaintiffs' amended complaint on the ground that it does not state facts sufficient to constitute a cause of action at law or to entitle plaintiffs to relief in equity against this defendant, and upon the further ground that it appears from the face of the complaint that this defendant is not a party to this action.

S. O. MORFORD and
IRA BRONSON,
Attorneys for Defendant, William B. Poland.

(Endorsed:) Filed in the District Court, Territory of Alaska, third division. Feb. 19, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy. [21]

26 In the District Court for the Territory of Alaska, third division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Decision on demurrer [to amended complaint].

On January 20, 1908, a patent for a fraction less than 160 acres of land, situate on the shore of Resurrection Bay, near Seward, Alaska, and designated as U. S. survey #241, was issued to the defendant Poland, under S. A. H. right. On the 22d day of March, 1909, a second patent was issued to said defendant Poland for 160 acres of land embraced within U. S. survey #242, which adjoins the said survey #241, on the northerly side; applications for patent to both of said surveys #241 and 242 having been made on the 26th day of April, 1906, in the U. S. land office at Juneau, Alaska.

The plaintiff brings this action to cancel the patent for the land embraced in said survey #242 for the reason that it is in violation of the terms of an act of Congress approved March 3, 1903 (sec. 101, Compiled Laws of Alaska), which provides that "no more than 160 acres shall be entered in 'any single body' by such scrip, lieu

27 selection, or soldier's additional homestead right," plaintiff's contention being that the two surveys, being contiguous, constitute a "single body" within the meaning of said law.

Plaintiff's complaint alleges that the Assistant Commissioner of the General Land Office, under the erroneous and mistaken belief that the laws gave said Poland a right to said land and that he was entitled under the law to receive patent therefor, mistakenly and erroneously, without authority, and in violation of law, and without jurisdiction so to do, approved the entry and application of the said Poland for the land embraced with said survey =242. [22]

The complaint further alleges that Poland filed or caused to be filed in the United States Land Office at Juneau, Alaska, "in support of his said application for a patent to the land embraced in said survey =242 an affidavit subscribed and sworn to by H. E. Revell and Frank Ballaine, which affidavit contained the following false statement:

"'Said tract of land (referring to the land embraced in said survey =242) does not exceed 160 acres in extent and is in frontage less than 160 yards along the shore of any navigable water, and is more than eighty rods distant from any other survey or entry under the provisions of said act of May 14, 1898,' the act referred to in said statement being the act of Congress entitled 'An act ex-
28 tending the homestead laws and providing for a right of way for railroads in the District of Alaska, and for other purposes,' approved May 14, 1898, as amended by the act of Congress entitled 'An act to amend section one of the act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for a right of way for railroads in the district of Alaska," approved March 3, 1903,'"

I know of no law requiring one location or survey under said act to be distant eighty rods from any other survey or entry made under the provisions of the said act. Said act does provide that "along the shore of any navigable water a space of at least 80 rods shall be reserved from entry between all such claims." But survey =242 is not along the shore of any navigable water, but is on the northerly or landward side of said survey =241, which is along the shore of Resurrection Bay. If one location or entry under said act was required to be eighty rods distant from another survey or entry under the provisions of the same act, it would lead to a manifest absurdity, in that each location or survey would stand alone surrounded by vacant lands on each side and corner, a distance of eighty rods in each direction.

The United States attorney contends that the intent of Congress in enacting this law was to restrict one individual from acquiring title to more than 160 acres, even by separate locations and entries, if the same be contiguous, but the act does not say so; it simply says that not more than 160 acres shall be *entered* in "any single body."

29 The words "locate" and "enter" are practically synonymous, each being a step or proceeding in the matter of acquiring title from the United States to public lands.

The United States mining laws for many years have provided that [23] no location of a placer claim shall exceed 160 acres for any one person or association of persons (sec. 2330, Rev. Stats.), but it has never been claimed that this restricted the same person or association of persons from making two locations immediately adjoining. The same reasoning would apply to one case as to the other, but in this case, if Congress intended to restrict an individual from locating or acquiring title to more than one 160-acre tract of land, it would have been very easy to have expressed that intent. It seems to me that it would violate all rules of statutory construction if we should read into said act something which was not expressed in it. The language is plain, clear and complete and does not require any forced construction to ascertain its meaning or intent.

Congress (wherever it has sought to restrict the right of an individual to more than one claim or to a certain number of acres, has always expressly provided such restriction: for instance, in limiting an individual to one homestead or one preemption claim, or other claims upon the public domain of the United States. The only limitation sought to be made upon the number of claims which can be located in Alaska was by an act of Congress approved August 1, 1912 (Sec. 129 C. Comp. Laws of Alaska), which provides

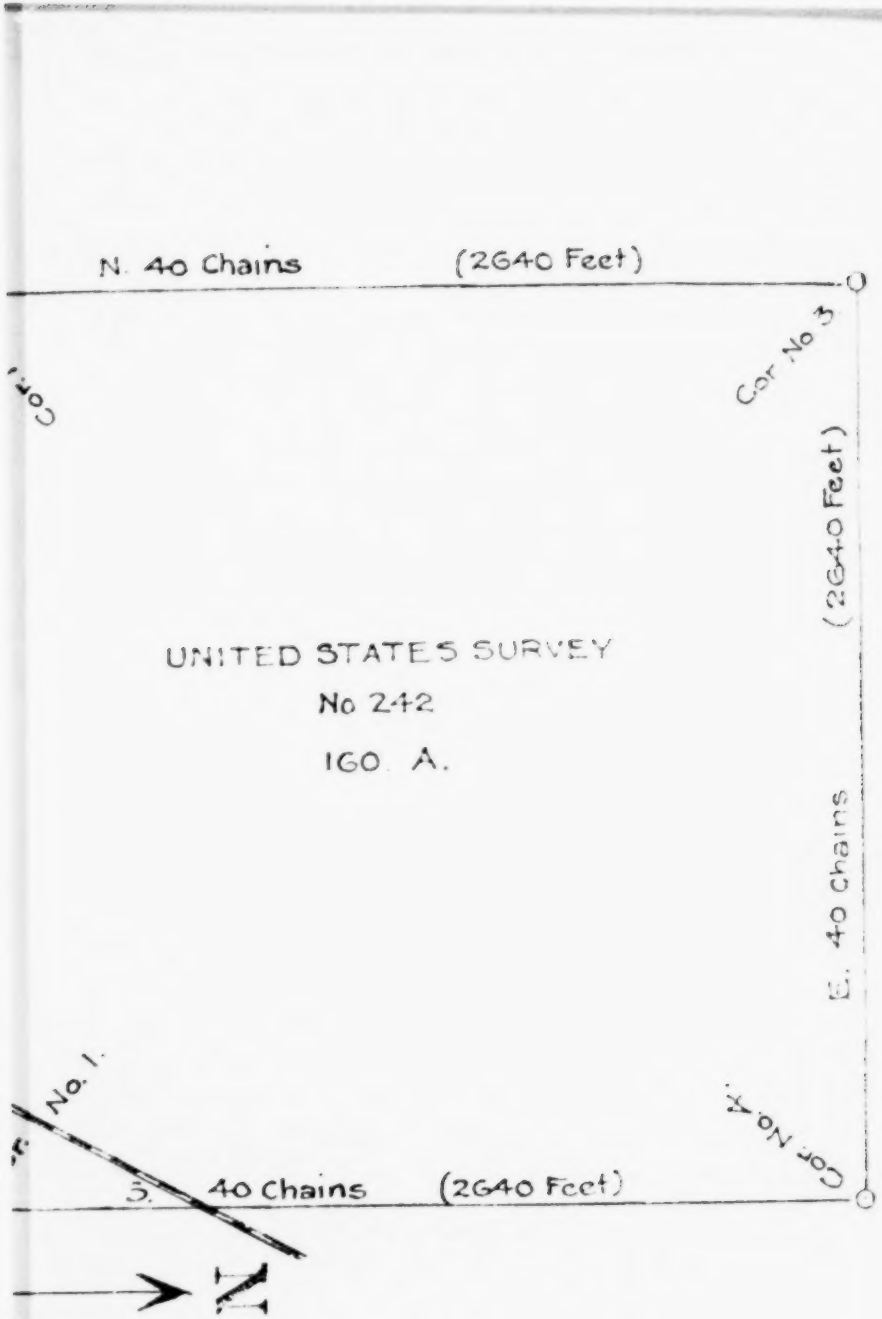
30 that "no person shall thereafter locate, cause, or procure to be located for himself more than two placer mining claims in any calendar month, provided that one or both of such locations may be included within an association claim."

It might be argued that it is a useless thing to provide that no more than 160 acres of land shall be entered in one single body under said act of March 3, 1903, if two such locations or claims could be entered or patented and they adjoined each other, but this is exactly what has been done for nearly fifty years in another class of public land entries.

In the case of placer mining claims, of 160 acres, it might just as well be asked, why should a claim or location be limited to 160 acres when two or more of such locations may be entered by the same locators when they adjoin and virtually constitute one body, tract, or area greatly in excess of the amount limited to a single location? The answer probably is that a limitation must be made [24] somewhere, otherwise one locator could locate the whole country, and it was probably placed at 160 acres as being a reasonable area to be included in one location, the presumption being that the additional expense of locating, surveying, and other expenses attendant upon holding and patenting the ground will operate as a check on excessive locating or patenting by one individual or association.

In a recent case in the U. S. District Court for the Western District of Washington, Shenk vs. Aumiller (217 Fed. Rep. 969), the court says:

7 .elnolse.g-tf-.sagf atfcolsil;s t :!


N. 40 Chains
(2640 Feet)
Cor No 3
(2640 Feet)
E. 40 chains
Cor No 4
S. 40 Chains
(2640 Feet)
No. 1
UNITED STATES SURVEY
No 242
160 A.

31 "Reference to the act of August 30, 1890, shows that Congress excluded from entry or settlement 'under any of the land laws * * * more than 320 acres in the aggregate under all of said laws.' This includes every classification. In the construction subsequently placed upon this act Congress referred to only two classifications of land: (a) Agricultural lands; and (b) mineral lands. The primary and general rule of statutory construction is that the intent of the lawmaker must be ascertained, when the language employed is involved and the intent not clearly expressed. The purpose for which the act under consideration is enacted being a matter of first importance in arriving at the solution of the question presented. I think it is proper for the court to consider that the conditions of the United States with relation to increase of population were greatly changed in 1890 from the conditions existing at the dates of the enactment of the various public land lands, and that the spirit of the administration of the public land laws was to benefit the many and not the few. It is common knowledge that in 1890 the public land area open to settlement was becoming very limited. It appears that Congress adopted a new policy by limiting the number of acres to be entered by a person 'under any of the land laws' and 'under all of the laws.'"

Reasoning from like considerations in this case it may be said that conditions in Alaska are very dissimilar from what they are in the States of the Union, and that the Congress of the United States recognized this by fixing 320 acres as the amount which could be taken in a homestead in Alaska. There is little or no danger of monopolization of the nonmineral lands of Alaska by an excessive number of entries being made by one locator. There was one such tendency in the matter of locating mining claims, which was sought to be checked by the act of August 1, 1912, above referred to. The only likelihood of any monopoly is along the shore line of navigable waters and this is sufficiently guarded against by the provisions in said [25] act of March 3, 1903, reserving eighty acres along the shore of navigable waters between entries made under such acts.

I do not see where there is any fraud on the part of the defendant in entering the two said separate tracts of land under said acts, even though the same adjoined each other, and the demurrer will have to be sustained.

Done at Valdez, Alaska, this 23d day of March, 1915.

FRED M. BROWN,
District Judge.

Entered court journal No. 9, page No. 30.
Filed in the District Court, Territory of Alaska, Third Division.
Mar. 23, 1915. Arthur Lang, clerk. By Chas A. Hand, deputy.

35 In the District Court for the Territory of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.

Application and motion for leave to file affidavits showing value of subject matter in controversy.

Comes now the plaintiffs and make application to the court for leave to file the affidavits of J. H. Romig, Edmund Rudolph, and F. B. Wood, showing the amount involved and the value of the subject matter in controversy in the above-entitled cause, which affidavits are tendered herewith.

WILLIAM N. SPENCE,
United States Attorney.

Due service of the foregoing motion and application hereby acknowledged in Seward, Territory of Alaska, third judicial division, by receiving a true copy thereof certified as such by William A. Munly, assistant United States attorney.

This 13th day of April, 1915.

S. O. MORFORD,
Attorney for Defendants.

36 (Endorsed:) Filed in the District Court, Territory of Alaska, third division, Apr. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [28]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.
No. 593.

Order allowing filing of affidavits showing value of subject matter in controversy.

This matter coming on for a hearing upon the motion and application for leave to file the affidavits of J. H. Romig, F. B. Wood, and Edmund Rudolph, showing the amount involved and the value of the subject matter in controversy in the above-entitled suit, the plaintiffs appearing by William N. Spence, United States attorney, and the defendants by S. O. Morford, attorney for said defendants, and after argument and the court being advised in the premises, said motion and application is allowed.

It is therefore ordered that the affidavits of said J. H. Romig, F. B. Wood, and Edmund Rudolph, showing the amount involved

and the value of the subject matter in controversy in the above-entitled suit be allowed to be filed herein, and the same are
37 hereby made a part of the record in the above-entitled suit.

Done in open court this tenth day of May, 1914.

FRED M. BROWN,
District Judge.

To which defendant excepts and exception is allowed.

FRED M. BROWN, *Judge.*

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division, May 10, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 118. [29]

[*Affidavit of Edmund Rudolph, re value of subject matter in controversy.*]

In the District Court for the Territory of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.

UNITED STATES OF AMERICA,
Territory of Alaska, Third Division, } *ss.*

I, Edmund Rudolph, being first duly sworn, depose and say: I am a resident of the town of Seward, in the Territory of Alaska; that I am acquainted with the value of the following-described
38 real property situate in the Territory of Alaska, in the Seward recording district, to wit:

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2, thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east 40 chains to corner No. 4, an iron pipe three inches in diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States survey No. 242, according to the official plat of said survey returned to the general land office by the Surveyor General.

That said property is the same property that is involved in the above-entitled suit brought by the United States against the defendants for the purpose of canceling a patent to said land. That said land is situate a short distance from said town of Seward, Alaska.

That the value of said land as above described and in controversy in said suit is five thousand dollars.

EDMUND RUDOLPH. [30]

39 Subscribed and sworn to before me this 3d day of April, 1915.

[SEAL.] WM. H. WHITTLESEY,
Notary Public for the Territory of Alaska.

My commission expires Nov. 30th, 1917.

UNITED STATES OF AMERICA,
Territory of Alaska, Third Judicial Division, ss:

I, William H. Whittlesey, being first duly sworn, depose and say: That I am a citizen of the United States, over the age of twenty-one years and qualified to be a witness in this case; that I did on the 6th day of April, 1915, at Seward, Alaska, serve the foregoing affidavit upon S. O. Morford, Esq., attorney for defendants herein, by delivering to and leaving with him, personally, a certified copy thereof.

WILLIAM H. WHITTLESEY.

Subscribed and sworn to before me this 6th day of April, 1915.

[SEAL.] CURTIS R. MORFORD,
Notary Public for Alaska.

My commission expires Oct. 8, 1915.

(Endorsed:) Filed in the District Court, Territory of Alaska, third division, Apr. 15, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy. [31]

40 [*Affidavit of F. B. Wood, re value of subject matter in controversy.*]

In the District Court for the Territory of Alaska, Division Number Three.

UNITED STATES OF AMERICA, PLAINTIFFS,

vs.

WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.

UNITED STATES OF AMERICA,
Territory of Alaska, Third Division, ss:

I, F. B. Wood, being first duly sworn, depose and say: I am a resident of the town of Seward, in the Territory of Alaska; that I am acquainted with the value of the following described real property situate in the Territory of Alaska, in the Seward recording district, to wit:

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe

three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2; thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east
41 chains to corner No. 4, an iron pipe hree inches in diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the General Land Office by the Surveyor General.

That said property is the same property that is involved in the above-entitled suit brought by the United States against the defendants for the purpose of canceling a patent to said land. That said land is situate a short distance from said town of Seward, Alaska.

That the value of said land as above described and in controversy in said suit is five thousand dollars.

F. B. Wood. [32]

Subscribed and sworn to before me this 3d day of April, 1915.

[SEAL.] Wm. H. Whittlesey,
Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Due service of the foregoing affidavit is hereby acknowledged in Seward, Territory of Alaska, Third Division, by receiving a copy thereof, certified as such by William H. Whittlesey, Assistant United States Attorney.

This — day of April, 1915.

———,
Attorney for Defendants.

42 United States of America, *Territory of Alaska, Third Judicial Division, ss:*

I, William H. Whittlesey, being first duly sworn, depose and say: That I am a citizen of the United States, over the age of twenty-one years and qualified to be a witness in this case; that I did on the 6th day of April, 1915, at Seward, Alaska, serve the foregoing affidavit upon S. O. Morford, Esq., attorney for defendants herein, by delivering to and leaving with him, personally, a certified copy thereof.

William H. Whittlesey.

Subscribed and sworn to before me this 6th day of April, 1915.

[SEAL.] Curtis R. Morford,
Notary Public for Alaska.

My commission expires Oct. 9, 1915.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division, Apr. 15, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy. [33]

43 [*Affidavit of J. H. Romig, re value of subject matter in controversy.*]

In the District Court for the Territory of Alaska, division number three.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.

UNITED STATES OF AMERICA,
Territory of Alaska,
Third Division, } *ss:*

I, J. H. Romig, being first duly sworn, depose and say: I am a resident of the town of Seward, in the Territory of Alaska; that I am acquainted with the value of the following-described real property situate in the Territory of Alaska, in the Seward recording district, to wit:

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2; thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east
44 40 chains to corner No. 4, an iron pipe three inches in diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States survey No. 242, according to the official plat of said survey returned to the General Land Office by the surveyor general.

That said property is the same property that is involved in the above-entitled suit brought by the United States against the defendants for the purpose of canceling a patent to said land. That said land is situate a short distance from said town of Seward, Alaska.

That the value of said land as above described and in controversy in said suit is three thousand and 00/100 dollars.

J. H. ROMIG. [34]

Subscribed and sworn to before me this 3d day of April, 1915.

[SEAL.] WM. H. WHITTLESEY,
Notary Public for the Territory of Alaska.

My commission expires Nov. 30, 1917.

UNITED STATES OF AMERICA,
Territory of Alaska,
Third Judicial Division, } *ss:*

I, William H. Whittlesey, being first duly sworn, depose and say: That I am a citizen of the United States, over the age of twenty-one years and qualified to be a witness in this case; that I did on the 6th day of April, 1915, at Seward, Alaska, serve the foregoing

affidavit upon S. O. Morford, Esq., attorney for defendants herein, by delivering to and leaving with him, personally, a certified copy thereof. [35]

WILLIAM H. WHITTLESEY.

Subscribed and sworn to before me this 6th day of April, 1915.

CURTIS R. MORFORD.
Notary Public for Alaska.

My commission expires Oct. 9, 1915.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division, Apr. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

[*Order of dismissal.*]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS. } No. 593.

Order on demurrer.

This cause coming on regularly to be heard upon demurrer of defendant to plaintiff's complaint, on the 23d day of March, 1915, plaintiff being represented by William N. Spence and Guy Brubecker, United States attorneys, and defendant being represented by S. O. Morford, Esq., and the court having heard the arguments [36] of respective counsel, and being fully advised in the premises, rendered its decision in writing, sustaining defendant's demurrer to plaintiff's complaint in all points therein, and the plaintiff declining to plead further.

It is hereby ordered, adjudged, and decreed, that plaintiff's action be and hereby is dismissed.

FRED M. BROWN.
District Judge.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division, May 29, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered in Court Journal No. 9, page No. 155.

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS. } No. 593.

Amended decree.

This cause coming on to be heard upon motion of the defendants to amend the decree heretofore entered herein, on the 29 day of May, 1915, by dismissing the complaint and complaint as amended and the plaintiffs' action as to both of said defendants, and it ap-

47 pearing to the court that in the decree heretofore entered herein as aforesaid, said decree applied to defendant instead of defendants, and it appearing that said error was made through inadvertence and mistake said motion to amend said decree is allowed:

It is therefore ordered, adjudged, and decreed that the demurrer of the defendants and of each of said defendants to the plaintiffs' amended complaint be, and the same is hereby, sustained, and the plaintiffs' complaint and amended complaint and the plaintiffs' said action be, and the same are hereby, dismissed.

Done in open court this 21st day of June, 1915.

FRED M. BROWN, *District Judge.*

Filed in the District Court, Territory of Alaska, Third Division, June 21, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy.

Entered court journal No. 9, page No. 166. [37]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS, vs. WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS.	No. 393.

48 *Petition for appeal.*

To the honorable the judge of the above-entitled court:

The above-named plaintiffs, the United States of America, by and through William N. Spence, United States attorney for the Third Division of the District of Alaska, acting under and by the direction of the Attorney General of the United States of America, conceiving themselves aggrieved by the order and decree made and entered in the above-named cause, on the 29 day of May, 1915, which order and decree was amended by the above-entitled court on the 21 day of June, 1915, wherein and whereby it was ordered, adjudged, and decreed that the demurrers of the defendants and each of them to the amended complaint of the plaintiffs be sustained and that said plaintiffs' complaint, amended complaint, and action be, and were, dismissed, do hereby appeal from the said order and decree and amended decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors filed herein, and said plaintiffs pray that this appeal be allowed and that a transcript of the record, papers, and proceedings upon which the said order and decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM N. SPENCE,
United States Attorney.

Dated this 22d day of June, 1915.

49 (Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. June 2, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy. [38]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS. } No. 593.

Order allowing appeal.

Now, on this day come the plaintiffs, the United States of America, by William X. Spence, United States attorney for the above-entitled district, acting under and by the direction of the Attorney General of the United States of America, and present to the court its petition praying for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and decree of the above-entitled court made and entered herein on the 29 day of May, 1915, which order and decree was amended by the above-entitled court on June 21, 1915, ordering and decreeing that the demurrers of the defendants and the demurrer of each of said defendants to the amended complaint of the plaintiffs filed herein be sustained and that the complaint, amended complaint, and
50 action of the plaintiffs be dismissed and said plaintiffs also present a bond on said appeal with sufficient sureties in the sum of one thousand dollars ($1,000).

Whereupon it is ordered that the prayer of said petition be granted and that said plaintiffs, the United States of America, be, and they are hereby, allowed to take the appeal prayed for in said petition and that said bond presented by said plaintiffs be, and the same is hereby, approved.

Done in open court this 22d day of June, 1915.

FRED M. BROWN,
Judge of the above-entitled court.

(Endorsed:) Filed in the District Court, Ter. of Alaska, Third Div. June 22, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy.

(Endorsed:) Entered court journal No. 9, page 170. [39]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS. } No. 593.

Assignment of errors.

Come now on this — day of June, 1915, the plaintiffs in the above-entitled cause and file the following assignment of errors
51 which they will rely upon their appeal from the order and

decree made by this honorable court on the 29 day of May, 1915, which order and decree was amended on the 21 day of June, 1915, in the above-entitled cause.

I.

The court erred in sustaining the demurrers of the defendants and the demurrer of each of said defendants to the plaintiffs' amended complaint.

II.

The court erred in not overruling the said demurrers of the defendants and the demurrer of each of said defendants to said amended complaint of plaintiff.

III.

The court erred in sustaining the demurrers of the defendants and the demurrer of each of said defendants to the complaint of the plaintiffs as amended.

IV.

The court erred in not overruling said demurrers of the defendants and the demurrer of each of said defendants to the plaintiffs' complaint as amended. [40]

V.

The court erred in entering the decree and amended decree herein sustaining said demurrers of the defendants and the demurrer of each of said defendants to said amended complaint of the plaintiffs, and dismissing the action of the plaintiffs herein.

VI.

The court erred in not overruling said demurrers of the defendants and the demurrer of each of said defendants to said amended
52 complaint of the plaintiffs and in not requiring said defendants and each of them to answer said complaint as amended.

Wherefore, said plaintiffs pray the court that said order and decree of the above-entitled court and said order and decree as amended as aforesaid may be reversed and that said court may be directed to enter a decree as set forth in the amended complaint of the plaintiffs.

WILLIAM X. SPENCE,
United States Attorney.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. June 22, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [41]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, DEFENDANTS. } No. 593.

Bond on appeal.

KNOW all men by these presents that we, the United States of America, by and through William X. Spence, United States attorney for the Territory of Alaska, Third Division, under the authority and by the direction of the Attorney General of the United
53 States, as principal and Albert E. Grigsby and M. F. Hendrickson, of Valdez, Alaska, are held and firmly bound unto William B. Poland and Frederick William Low in the sum of one thousand dollars ($1,000) to be paid to said William B. Poland and Frederick William Low, their attorneys, executors, or administrators. To which payment, well and truly to be made, we bind ourselves, jointly and severally, our executors and administrators, firmly by these presents.

Sealed with our seals and dated this 22 day of June, 1915.

Whereas the above-named United States of America have appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree and amended decree in the above-entitled cause entered and rendered in the above-entitled action by the District Court for the Territory of Alaska, Third Division, made and entered on the 29 day of May, 1915, amended by decree and order entered on 21 day of June, 1915.

Now, therefore, the condition of this obligation is such that if the above-named United States of America shall prosecute said appeal to effect and answer all costs and damages if said United States of America shall fail to make good said appeal, then [42] this obligation shall be void; otherwise the same shall be and remain in full force, virtue, and effect. In testimony whereof said United States of America has caused *this* presents to be signed by William X. Spence, United States Attorney for the Territory of Alaska, Third Division, acting under the authority and by the direction of
54 the Attorney General of the United States, and the said Albert B. Grigsby and M. F. Hendrickson have signed and sealed these presents the day and year above written.

UNITED STATES OF AMERICA,
By WILLIAM X. SPENCE,
United States Attorney.
ALBERT E. GRIGSBY. [SEAL.]
M. F. HENDRICKSON. [SEAL.]

UNITED STATES OF AMERICA,
Territory of Alaska, Third Division, } ss.

I, Albert E. Grigsby and M. F. Hendrickson, being each severally and duly sworn, depose and say: That I am one of the sureties in the

foregoing bond, that I am a resident and freeholder within said District: that I am worth in property therein over the sum of two thousand dollars ($2,000), over and above all my just debts and liabilities, exclusive of property exempt from execution: that I am not a counsellor, attorney, marshal, clerk, or other officer of any court.

ALBERT E. GRIGSBY.
M. F. HENDRICKSON.

Subscribed and sworn to before me this 22d day of June, 1915.

[SEAL.] T. P. GERAGHTY.
Deputy Clerk of Court, Ter. of Alaska, Third Division.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. June 22, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [43]

55 In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Citation on appeal [copy].

To William B. Poland and Frederick William Low, defendants above named, and each of them, greeting:

Whereas United States of America, plaintiffs above named, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order and decree rendered in the District Court for the Territory of Alaska, Third Division, which order and decree was entered in the above-entitled court on May 29, 1915, and which decree was amended therein on June 21, 1915, in your favor, and have given the security required by law: you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

56 Given under my hand at Valdez, in said district, this 22d day of June, in the year of our Lord one thousand nine hundred and fifteen.

FRED M. BROWN.
Judge of the Above-entitled Court.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. June 22d, 1915. Arthur Lang, clerk. By T. P. Geraghty, deputy.

Entered Court Journal No. 9, page No. 171. [44]

UNITED STATES OF AMERICA,
Territory of Alaska, Third Division, ss:

I hereby certify and return that I served the annexed citation on appeal on S. O. Morford, attorney of record, for the within-named defendants William B. Poland and Frederick Wm. Low, by handing to and leaving a true and correct copy thereof with him personally, at Seward, in said district for said division, on the 25th day of June, in the year of our Lord one thousand nine hundred and fifteen.

F. R. BRENNEMAN,
United States Marshal.
By ISAAC EVANS,
Deputy U. S. Marshal.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. June 28, 1915. Arthur Lang, clerk. [45]

57 In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Order extending time to file record.

Now, at this day, for good cause shown to the above-entitled court, it is ordered that the time for filing the transcript of record, proceedings, and papers in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended until 31st day of July, 1915.

Done in open court this 24th day of June, 1915.

FRED M. BROWN,
Judge of the Above-entitled Court.

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division. June 24, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 175. [46]

58 In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Acknowledgment of service of papers on appeal.

I, S. O. Morford, attorney of record for the defendants in the above-entitled cause, hereby acknowledge service in the matter of

appeal in the above-entitled cause and court on 28th day of June, 1915, at Valdez, Alaska, in the above-entitled district, by receiving copies of the original files and records as follows, to wit:

Petition for appeal.
Order allowing appeal.
Assignment of errors.
Bond for cost on appeal.
Citation.
Order extending time to file records and papers in said appeal.
Stipulation as to papers, documents, and records to be sent to the United States Circuit Court of Appeals for the Ninth Circuit.
Praecipe.

S. O. Morford,
Attorney for Above-named Defendants.

59 Filed in the District Court, Territory of Alaska, Third Division. June 28, 1915. Arthur Lang, Clerk. By ——, Deputy. [47]

In the District Court for the Territory of Alaska, Third Division.

United States of America, plaintiffs, vs. William B. Poland and Frederick William Low, defendants.	No. 593.

Stipulation as to papers, documents, and records to be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

It is hereby stipulated by and between the plaintiffs, United States of America, by plaintiffs' attorneys, William N. Spence, United States Attorney, and William A. Muny, Assistant United States attorney, and the defendants, by their attorney, S. O. Morford, that the transcript of the record on appeal of the above-entitled cause shall include the following papers and documents:

Application for leave to file amended complaint by plaintiffs.
Order granting leave to file amended complaint.
Amended complaint.
Demurrer of the defendants to the amended complaint.
60 Demurrer of the defendant, Frederick William Low.
Demurrer of the defendant, William B. Poland.
Courts decision sustaining demurrers.
Blue print showing location of land in controversy.
Application and motion for leave to file affidavits showing value of subject matter in controversy.
Order allowing filing of affidavits showing value of subject matter in controversy.
Affidavits of Edmund Rudolph, F. B. Wood, and J. H. Romig, showing value of subject matter in controversy.

Order and decree on demurrer sustaining demurrers of [48] *of* defendants and dismissing plaintiffs' action.

Amended decree sustaining demurrers of the defendants and each of them and dismissing plaintiffs' complaint, amended complaint, and action.

Petition of plaintiffs for appeal.

Order allowing appeal.

Assignment of errors.

Bond on appeal with justification thereon.

Citation on appeal with return and acknowledgment of service.

Order extending time to file appeal in Circuit Court of Appeals.

Acknowledgment of service of all the different papers as set forth in said acknowledgment.

61 Stipulation as to papers, to be sent to the Circuit Court of Appeals for the Ninth Circuit.

Praecipe.

And the clerk of the above-entitled court is hereby authorized to eliminate from the said record on appeal all the other matters in said record.

UNITED STATES OF AMERICA.
By WILLIAM N. SPENCE,
United States Attorney.
WILLIAM A. MUNLY,
Assistant U. S. Attorney.
S. O. MOREFORD,
Attorney for Defendants.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 28, 1915. Arthur Lang, Clerk. By ———, Deputy.

Dated this 28th day of June, 1915. [49]

In the District Court for the Territory of Alaska, Third Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, defendants. } No. 593.

Praecipe for transcript of record.

To the clerk of the above-entitled court:

62 You will please make, certify, and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a copy of the record in the above-entitled cause, as a return to the appeal heretofore taken and granted by the plaintiffs, the United States of America, to review the decree and amended decree in the above-entitled cause, which record shall consist of the following files and records, to wit:

Application for leave to file amended complaint by the plaintiffs.

Order granting leave to file amended complaint.

Amended complaint.

Demurrer of the defendants to the amended complaint.
Demurrer of the defendant Frederick William Low.
Demurrer of the defendant William B. Poland.
Court's decision sustaining demurrers.
Blue-print showing location of land in controversy.
Application and motion for leave to file affidavits showing value of subject matter in controversy.
Order allowing filing of affidavits showing value of subject matter in controversy. [50]
Affidavits of Edmund Rudolph, F. B. Wood, and J. H. Romig, showing value of subject matter in controversy.
Order and decree on demurrer sustaining demurrers of defendants and dismissing plaintiff's action.
63 Amended decree sustaining demurrers of the defendants and each of them and dismissing plaintiff's complaint, amended complaint, and action.
Petition of plaintiffs for appeal.
Order allowing appeal.
Assignment of errors.
Bond on appeal, with justification thereon.
Citation on appeal with return and acknowledgment of service.
Order extending time to file appeal in Circuit Court of Appeals.
Acknowledgment of service of all the different papers as set forth in said acknowledgment.
Stipulation as to papers, to be sent to the Circuit Court of Appeals for the Ninth Circuit.
This praecipe.

WILLIAM N. SPENCE,
United States Attorney.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 28, ——. Arthur Lang, Clerk. By ———, Deputy. [51]

In the District Court for the Territory of Alaska, Third Division.

Certificate of clerk U. S. District Court to transcript of record.

UNITED STATES OF AMERICA, }
Territory of Alaska, Third Division. } ss.

64 I, Arthur Lang, clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 51 pages, numbered from 1 to 51, inclusive, are a full, true, and correct transcript of records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that this transcript is made in accordance with the plaintiff's praecipe on file herein. I further certify that the foregoing transcript has been prepared, examined, and certified to by me on behalf of the plaintiff and plaintiff in error, the United States of America.

In witness whereof, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 28th day of June, A. D. 1915.

[SEAL.]

ARTHUR LANG
Clerk of the District Court,
Territory of Alaska, Third Division. [52]

(Endorsed:) No. 2621. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, appellant, vs. William B. Poland and Frederick William Low, appellees. Transcript of record. Upon appeal from the United States District Court for the District of Alaska, Division No. 3.

Filed July 7, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.
By MEREDITH SAWYER,
Deputy Clerk.

(Endorsed:) Printed transcript of record. Filed Aug. 2, 1915. F. D. Monckton, clerk.

65 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Upon appeal from the United States District Court for the District of Alaska, Division No. 3.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

66 At a stated term, to wit, the October term A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the twentieth day of October, in the year of our lord one thousand nine hundred and fifteen.

Present: Honorable William B. Gilbert, senior circuit judge, presiding; Honorable William W. Morrow, circuit judge; Honorable Frank H. Rudkin, district judge.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Order of submission.

Ordered, appeal in the above-entitled cause argued by Mr. Assistant United States William A. Munly, counsel for the appellant, and

by Mr. Ira Bronson, counsel for the appellees, and submitted to the court for consideration and decision.

67 At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and County of San Francisco, in the State of California, on Monday, the twenty-seventh day of March, in the year of our Lord one thousand, nine hundred and sixteen.

Present: Honorable William B. Gilbert, senior circuit judge, presiding; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Order directing filing of opinion and dissenting opinion and filing and recording of decree.

By direction of the Honorable William B. Gilbert and Erskine M. Ross, circuit judges, and the Honorable Frank H. Rudkin, district judge, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in said cause in accordance with said opinion.

By direction of the Honorable Frank H. Rudkin, district judge, ordered that the dissenting opinion written by him, and this day rendered in said cause, be forthwith filed by the clerk.

68 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Upon appeal from the United States District Court for the District of Alaska, Division No. 3.

Opinion of U. S. Circuit Court of Appeals.

Suit in equity by appellant (plaintiff in the court below) to cancel patent for certain lands, issued by the United States to William B. Poland, appellee; and to cancel deed from the latter to Frederick William Low, appellee, conveying the above-mentioned lands. Demurrer to complaint. Demurrer sustained and bill dismissed. Decree affirmed.

William N. Spence, United States attorney, and William A. Munly, assistant United States attorney, for the appellant.

S. O. Morford, Ira Bronson, J. S. Robinson, and H. B. Jones, for the appellees.

69 Before Gilbert and Morrow, Circuit Judges, and Rudkin, District Judge.

Morrow, Circuit Judge, delivered the opinion of the court:

The United States brought suit in the court below on a date not disclosed in the transcript of record; but an amended complaint was filed October 15, 1914. The object of the suit is to vacate, cancel, and declare null and void a patent of the United States for a tract of land of 160 acres, embraced in United States survey No. 242, in the Kenai recording precinct in the district of Alaska. The patent was issued to one William B. Poland on March 22, 1909, and seems to be regular on its face in every particular. The complaint also prays that a deed executed by Poland, dated May 25, 1909, conveying the land to Frederick William Low, be vacated, canceled, and declared null and void. The amended complaint was not filed until the statute of limitations of six years (section 8 of act of March 3, 1891; 26 Stat. 1095, 1099) had nearly run.

The defendant Poland entered the above-mentioned tract of land at the United States land office at Juneau, Alaska, on April 26, 1906, as the assignee of a certain soldier's additional homestead right, under the general homestead laws, and section 101 of the Compiled Laws of Alaska (act of March 3, 1903; 32 Stat. 1028).

On the same day Poland also made an entry at the land office at Juneau, as assignee of a soldier's additional homestead right, under the same acts of Congress as the previously described entry, of a

70 tract of land containing 159.75 acres, embraced in United States survey No. 241. All this appeared upon the face of the record and must have been known to the officers of the land department at the date of entries. Upon this survey and entry, a patent of the United States was issued to Poland on January 20, 1908. The tract of land described in survey No. 242 adjoins the tract of land described in survey No. 241 on the north.

In both the surveys and in the patents issued by the United States for these two tracts of land, their boundaries were described fully and accurately by monuments, courses, and distances. In survey No. 242, and in the patent issued upon that survey, the first call of the description is: "Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1." The description concludes with the rectal, "containing one hundred and sixty acres, being the land embraced within United States survey No. 242, according to the official plat of said survey returned to the General Land Office by the surveyor general." The two tracts are shown on the annexed plat. Nearly the entire length of the southern boundary of survey No. 241 follows the shore line of Resurrection Bay. Survey No. 242 does not touch Resurrection Bay or any other navigable water.

The vacation and cancellation of the patent dated March 22, 1909, issued upon survey No. 242, is sought upon the ground that the
71 patent was obtained in violation of section 101 of the Compiled Statute Laws of Alaska (act of March 3, 1903; 32 Stat. 1028), which provides that "no more than one hundred sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right," referring to the soldier's additional homestead right under which entries Nos. 241 and 242 were made by the defendant Poland.

It is also contended that the patent was obtained in violation of the further provision of the statute, "That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

With respect to the first alleged violation of the statute, it is contended that, although the patent issued upon survey No. 242 embraces but 160 acres, the patent issued upon survey No. 241 embraces 159.75 acres, and that the two together constitute an entry of more than 160 acres in a single body. The defendant Poland did not by his soldier's additional homestead right enter more than 160 acres of land in a single body under survey No. 242. Did he enter more by making the additional entry of the adjoining tract of 159.75 acres under survey No. 241? Technically, he did not. They were two separate and distinct entries and two separate and distinct bodies of land under our system of land measurement. But did he violate the intent and purpose of the statute by making the additional entry when the two together would exceed 160 acres? We think not.
72 What the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of land of more than 160 acres and not more than 320 acres elsewhere than along the shore.

This is plain from the provisions of the act relating to homesteads. Prior to this act the homestead right was limited in Alaska to 80 acres. (Section 1 of act of May 14, 1898; 30 Stat., 409.) This area was found insufficient for homestead purposes in that district, and by this act (of March 3, 1903; 32 Stat., 1028) it was expressly increased to 320 acres, subject to the limitation that no entry should extend more than one hundred and sixty rods along the shore of any navigable water. The term "single body" is not defined in the statute of March 3, 1903, nor by any previous statute; but it refers to acres of land, and must be held to refer to the bodies of acres of land dealt with in the statute. The statute deals with the entries of two bodies of land and qualifies them both; one of "one hundred and sixty rods along the shore of any navigable water"; and the other a homestead of "three hundred and twenty acres." With respect to the first body: One hundred and sixty rods is one side of a quarter section of land inclosing 160 acres; that is to say, under our system of land measurement it is the determining measurement of one of four equal sides of 160 acres. The statute adopts this measurement as the descriptive

limitation of 160 acres "along the shore of any navigable water." If on the other hand the body of land is elsewhere than along the shore of any navigable water, then the limitation of the entry is to an area of 320 acres under the other provision of the statute. It follows that the limitation as applied to these two bodies of land is in entire harmony with their location, and whichever location
73 we take, the entry or entries are within the limitations of the statute and not in conflict with it.

The next question is, was the entry by Poland as assignee of two soldiers' additional homestead rights in violation of the statute?

The statute of March 3, 1903, extended all the privileges of the homestead laws of the United States, not in conflict with the provisions of the act, and all rights incident thereto, to the District of Alaska, subject to such regulations as might be made by the Secretary of the Interior. It is further provided that no land scrip, nor land warrant of any kind whatsoever, should be located or exercised upon any lands in the said District, except as then provided by law.

The law at that time (act of May 14, 1898; 30 Stat., 409) extended to the District of Alaska the right to enter surveyed or unsurveyed lands under the provisions of the law relating to the acquisition of title through soldiers' additional homestead rights, but limited each entry under that act to 80 rods along the shore of any navigable water and reserved along such shore a space of at least 80 rods between all such claims. It also limited every homestead in the District to 80 acres in extent. The act of August 30, 1890 (26 Stat., 394) had provided that "No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres
in the aggregate, under all of said laws." In Kielblaugh v.
74 Sinero (32 L. D. 418), the Secretary of the Interior had held that the limitation in this statute did not apply to an entry made by the assignee of a soldier's additional homestead right, and that such an entry might be made without reference to the assignee's entry of or claim to other lands under any statute whatever. This decision was referred to by the Assistant Secretary of the Interior in the case of William P. Wall (38 L. D. 566) as declaring the law upon that subject. In Webster v. Luther (163 U. S. 331), it was held that persons entitled under section 2304 of the Revised Statutes to enter a homestead who may have theretofore entered under the homestead laws a quantity of land less than 160 acres, and who had the right under section 2306 [soldiers' additional homestead right] to make an additional entry, may assign and transfer that right, and in the hands of an assignee it was without restriction as to quantity.

This was the state of the law at the time of the passage of the act of March 3, 1903, containing the provision, "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

This provision was not contained in the original bill, H. R. 129
as reported to the House on December 6, 1902 (Cong. Rec., 57
Cong., 2d sess., p. 81). That bill amended section 1 of the act of M
14, 1898, by striking out "eighty" in the last line thereof and inser
ing "three hundred and twenty," making the statute to read "th
no homestead shall exceed three hundred and twenty acres
75 This was all there was in the bill, and it passed the House
that form without any other change or amendment to the a
of May 14, 1898.

In the Senate, the House bill was amended in certain particula
among others an amendment taking out of the operation of the l
the right to commute a homestead entry and the right to enter s
veyed or unsurveyed lands under the provisions of the law relati
to the acquisition of title through soldiers' additional homeste
rights. There was also an amendment providing that no entry shou
be allowed extending more than 160 rods along the shore of a
navigable water. This latter amendment was to take the place
the provision in the act of May 14, 1898, providing that no ent
should be allowed extending more than eighty rods along the sho
of any navigable water.

The House provision, enlarging the homestead entry from eigh
acres to three hundred and twenty acres in extent, was retained in t
bill. The provision that "no more than one hundred and sixty ac
shall be entered in any single body by such scrip, lieu selection,
soldier's additional homestead right" was not added in the Senat
in other words, this provision was not in the bill when it was
turned to the House for concurrence.

In the House, the Senate amendments were nonconcurred in, a
a committee of conference was requested upon the disagreeing vo
of the two Houses. A committee of conference was appointed. T
provision was not in the bill when the bill was sent to conferen
The conference committee reached an agreement and so
76 ported to the two Houses. In this report appears for t
first time the provision, "that no more than 160 acres shall
entered in a single body."

It is a rule of parliamentary law that a committee of conferen
is not authorized to consider matters which had neither been inc
porated in Senate amendments nor brought before the House, unl
germane to something in the bill. (Hinds Parliamentary Pre
dents, sections 1414–1417.) It will be presumed that the conferen
report was in accordance with parliamentary law.

Mr. Lacey, chairman of the House conference committee, in
report to the House concerning the amendments, said: "This is wh
has been known as the Alaska homestead bill. The proposition is
give homesteads in that country to the extent of 320 acres. T
principal matter of difference between the House and the Senate c
ferees was upon the question of commutation and the use of scrip
Alaska. Upon the question of the use of scrip the agreement lea
these matters substantially as they are now, excepting to make t

N. 40 Chains (2640 Feet)

Cor. No. 4

Cor. No. 3

UNITED STATES SURVEY

No 242

160 A.

(2640 Feet)

E. 40 chains

Cor. No. 2

Cor. No. 1

S. 40 Chains (2640 Feet)

N

law clear that scrip shall not be located upon streams in such a way as to make a continuous location, but that a quarter of a mile between any two locations will be reserved. There can be no monopoly of the shores of the water courses. As to commutation, it provides that there may be commutation on a quarter section, but not on the whole amount of 320 acres."

In reply to questions propounded by members of the House, Mr. Lacey said: "Mr. Speaker, as the bill left the House it was
77 320 acres. As agreed on now it is 320 acres. As to commutation, the amount to be commuted is limited to 160 acres."

Mr. Stephens of Texas: "Mr. Speaker, the question I would like to ask is whether or not it changes the law with reference to settlements on these lands?"

Mr. Lacey: "Not at all. It leaves the law the same as it is in other parts of the United States."

(Congressional Record, 57th Cong., 2d sess., pp. 2859-60.)

This reference to the proceedings in Congress in the passage of the act of March 3, 1903, and the report of the conference committee is justified by similar references made by the Supreme Court in Holy Trinity Church v. United States, 143 U. S., 457, 464; Binns v. United States, 194 U. S., 486, 495; Oceanic Steam Navigation Co. v. Stranahan, 214 U. S., 320, 333; Northern Pacific v. Washington, 222 U. S., 370, 380; McLean v. United States, 226 U. S., 374, 380.

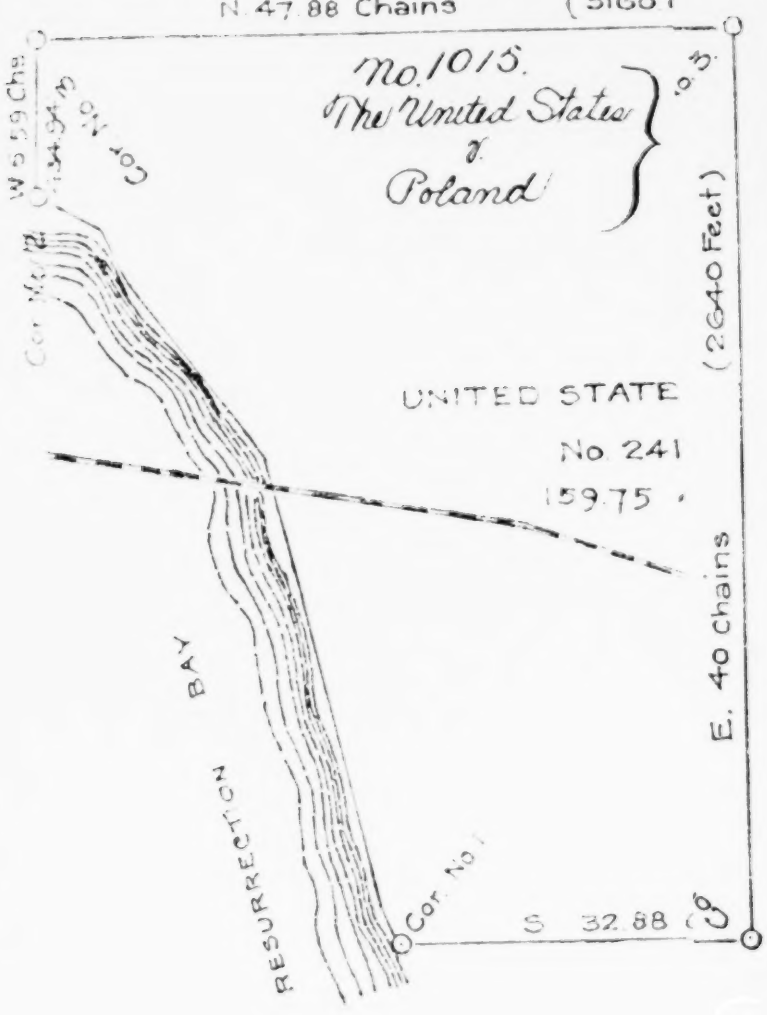
In the light of the report of the committee of conference, we must hold that the limitation that "no more than one hundred and sixty acres shall be entered in a single body" was germane to the Senate amendment that "no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water," and that it was so intended.

It is contended further that the act of May 14, 1898 (30 Stat., 409), provides in section 1 "That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims." Survey No. 242 does not extend
78 along the shore of any navigable water eighty rods, or any distance, or at all. It does not touch any navigable water, and what we have said concerning the first objection to the entry is applicable to this objection. The provision, that "along such shore a space of at least eighty rods shall be reserved from entry between all such claims," means plainly that a space of at least eighty rods shall be reserved from entry along the shore of the navigable water between claims along such shore. It cannot mean that there shall be reserved a space of eighty rods from any other entry, however situated; such construction would be obviously contrary to the intent and purpose of the statute and inadmissible. We are of the opinion that the complaint did not state a cause of action.

The decree of the court below is therefore affirmed.

(Endorsed:) Opinion. Filed Mar. 27, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

FILED in the District Court,
Territory of Alaska, Third Division.
MAR 24 1915
ARTHUR LANG, Clerk
Chas Wilcut Deputy



79 In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, APPELLANT, *vs.* WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellee.	No. 2621. Opinion.

Dissenting opinion of Rudkin, D. J.

William L. Spence, U. S. atty., and William A. Munly, ass't. U. S. atty., for appellant.

Ira Bronson, J. S. Robinson, and H. B. Jones for appellees.

Before Gilbert and Morrow, circuit judges, and Rudkin, district judge.

Rudkin, district judge: As will appear from the plat attached to the majority opinion the appellee, Poland, has entered and acquired title to approximately three hundred and twenty acres of land in the District of Alaska, in a single body, by soldier's additional homestead right. It occurs to me that this was a plain and palpable violation of the act of March 3, 1903 (32 Stat., 1028), extending the homestead laws of the United States to the District of Alaska and providing, among other things, that "no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

A brief reference to the legislative history of this right and to the decisions of the department thereunder will throw some light on the object of the proviso in question. Section 2304 of the Revised Statutes provides that every private soldier and officer who
80 served in the Army of the United States during the rebellion for ninety days, and who was honorably discharged, and has remained loyal to the Government, shall be entitled to enter and receive patents for a quantity of public lands not exceeding one hundred and sixty acres on certain terms and conditions not material here. Section 2306 provides:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

In Webster v. Luther (163 U. S., 331) it was held that this additional right was transferable without restriction.

In the case of Ole B. Olson (33 Land Dec., 225), it was held that the assignee of two or more soldiers' additional homestead rights may locate them as one right upon the same tract of land, provided they equal in the aggregate the amount of land so located.

In the case of Kiehlbauch v. Simero (32 Land Dec., 418) it was held that the quantity of land which an assignee of a soldier's addi-

tional right may enter is not restricted by the act of August 30, 1890 (26 Stat., 391), providing that—

"No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands or whose occupation, entry, or settlement is validated by this act."

84 Or by the act of March 3, 1891 (26 Stat., 1101), providing that the act of August 30, 1890, supra, "shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under the mineral-land laws."

By letter of instructions from the Secretary of the Interior to the Commissioner of the General Land Office under date of June 29, 1905 (33 Land Dec., 606), the same view is again asserted.

The act of May 14, 1898, entitled "An act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes" (30 Stat., 409), provides that:

"The homestead laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldier's additional homestead rights, are hereby extended to the District of Alaska subject to such regulations as may be made by the Secretary of the Interior: and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District of Alaska shall be located within or taken from lands in said District: Provided, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said District: And it is further provided, That no homestead shall exceed eighty acres in extent."

85 By letter of instructions from the Secretary of the Interior to the Commissioner of the General Land Office under date of December 4, 1902 (31 Land Dec., 442), it was declared that this proviso did not limit the number of entries that might be made by an assignee of several additional soldier's rights under section 2306 of the Revised Statutes. The letter in question reads as follows:

"This department is in receipt of your letter of November 21, 1902, requesting instructions as to whether or not the last proviso to section 1 of the act of May 14, 1898 (30 Stat., 409), places a limitation upon the right of the assignee of a soldier's additional right of

homestead entry under section 2306 of the Revised Statutes, so as to prevent the assignee of several of such additional rights from making several entries of eighty acres each thereunder of public lands in the district of Alaska.

"Said proviso is as follows: 'And it is further provided that no homestead shall exceed eighty acres in extent.'

"You express the opinion that the number of entries that may be made by an assignee is not limited by the terms of this proviso, and in this conclusion the department concurs. The limitation is placed upon the acreage that may be included in a single homestead entry, and can not apply to an assignee who in the exercise of the additional right does not seek to take in any one entry more than eighty acres."

These instructions were followed in a very few months by the act of March 3, 1903 (32 Stat., 1028), containing the proviso above quoted "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selections, or soldier's additional homestead right."

From the foregoing it will be seen that prior to the passage
83 of the act of March 3, 1903, there was (a) no limitation on the quantity of land an assignee of soldier's additional homestead rights might acquire in the District of Alaska, and (b) no limitation on the quantity of land that might be embraced in a single application or location, provided the assigned rights equaled in the aggregate the quantity of land located upon. The appellee Poland made two applications for approximately three hundred and twenty acres of land in a single body on the same day, as assignee of four separate soldiers' additional homestead rights, and has received patents therefor. There is no reason why the four rights might not have been embraced in a single application or location, and had they been the violation of the statute would be too obvious to admit of question. The statutory prohibition is against acquiring more than one hundred and sixty acres in a single body by soldier's additional homestead right, not merely a prohibition against acquiring more than one hundred and sixty acres in a single application or under a single location. Could then, the appellee, by making two applications or locations instead of one, and by drawing an imaginary line between the two surveys, thwart the will of Congress and defeat its declared policy? The question suggests its own answer. I see no connection between the proviso that no more than one hundred and sixty acres of land shall be entered in any single body and the further proviso that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water. The former proviso is complete in itself and speaks for itself. It first appeared in the amendment of 1903 and was intended to accomplish some purpose. How it got there is not material. Suffice it to say it is the law of the land. The purpose of the amendment, however, is dis-
84 closed in the legislative history of the act set forth in the majority opinion. The Senate favored the abrogation of the additional homestead right entirely in the District of Alaska, but as

a matter of compromise, no doubt, the right was retained, limited, however, to the right to acquire one hundred and sixty acres in any single body. As already stated, if this legislation only compels the assignee of such rights to so marshal them that not more than one hundred and sixty acres will be included in a single application or entry the act accomplishes no useful purpose. The manifest object was to prohibit the acquisition of large bodies of land in the District of Alaska under soldiers' additional homestead rights, and if the majority opinion prevails that object can readily be defeated. I am also of opinion that the affidavit to the effect that survey No. 242 " is more than eighty rods distant from any other survey or entry under the provisions of said act of May 14, 1898," was false whether intentionally so or not; but if not false the second patent issued through a manifest mistake which is equally within the corrective power of a court of equity. The decree should be reversed.

(Endorsed:) Dissenting opinion. Filed Mar. 27, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

85 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT.
vs.
WILLIAM B. POLLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Decree, U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Alaska, Division No. 3.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Alaska, Division No. 3, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and hereby is, affirmed.

[Endorsed:] Decree. Filed and entered March 27, 1916. F. D. Monckton, clerk.

86 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT.
vs.
WILLIAM B. POLLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Certificate of clerk, U. S. Circuit Court of Appeals to record certified under section 3 of Rule 31 of the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

eighty-five (85) pages, numbered from and including 1 to and including 85, to be a true copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twenty-seventh day of December, A. D. 1916.

[SEAL.] F. D. MONCKTON,
Clerk.
By PAUL P. O'BRIEN,
Deputy Clerk.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Being informed that there is now pending before you a suit in which the United States of America is appellant, and William B. Poland and Frederick William Low are appellees, No. 2621, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Alaska, Division No. 3, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and
88 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

89 (Indorsed:) File No. 25,845. Supreme Court of the United States. No. 1015, October term, 1916. The United States vs. William B. Poland et al. Writ of certiorari.

Docketed, No. 2621. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America vs. William B. Poland et al. Writ of certiorari from Supreme Court of the United States. Filed May 2, 1917. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

90 In the Supreme Court of the United States, October term, 1916.

THE UNITED STATES, PETITIONER,
vs.
WM. B. POLAND & FRED. WM. LOW. } No. 1015.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified transcript of the record herein, now on file in the office of the clerk of the Supreme Court, may be taken as the return of the clerk of the Circuit Court of Appeals for the Ninth Circuit to the writ of certiorari issued herein.

(Signed) JNO. W. DAVIS (H.),
Solicitor General.

(Signed) BRAGNON, ROBINSON & JONES,
Counsel for Respondent.

April 27, 1917.
(File No. 162270.)

(Endorsed:) No. 2621. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, appellant, vs. William B. Poland and Frederick William Low, appellees. Stipulation as to return to writ of certiorari. Filed May 9th, 1917. F. D. Monckton, clerk.

91 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees. } No. 2621.

Certificate of clerk, U. S. Circuit Court of Appeals to stipulation as to return to writ of certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a "Stipulation as to return to writ of certiorari," filed in the above-entitled cause on the 9th day of May, A. D. 1917, as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 9th day of May, A. D. 1917.

[SEAL.] F. D. MONCKTON, *Clerk.*

92 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT, vs. WILLIAM B. POLAND AND FREDERICK WILLIAM LOW, appellees.	No. 2621.

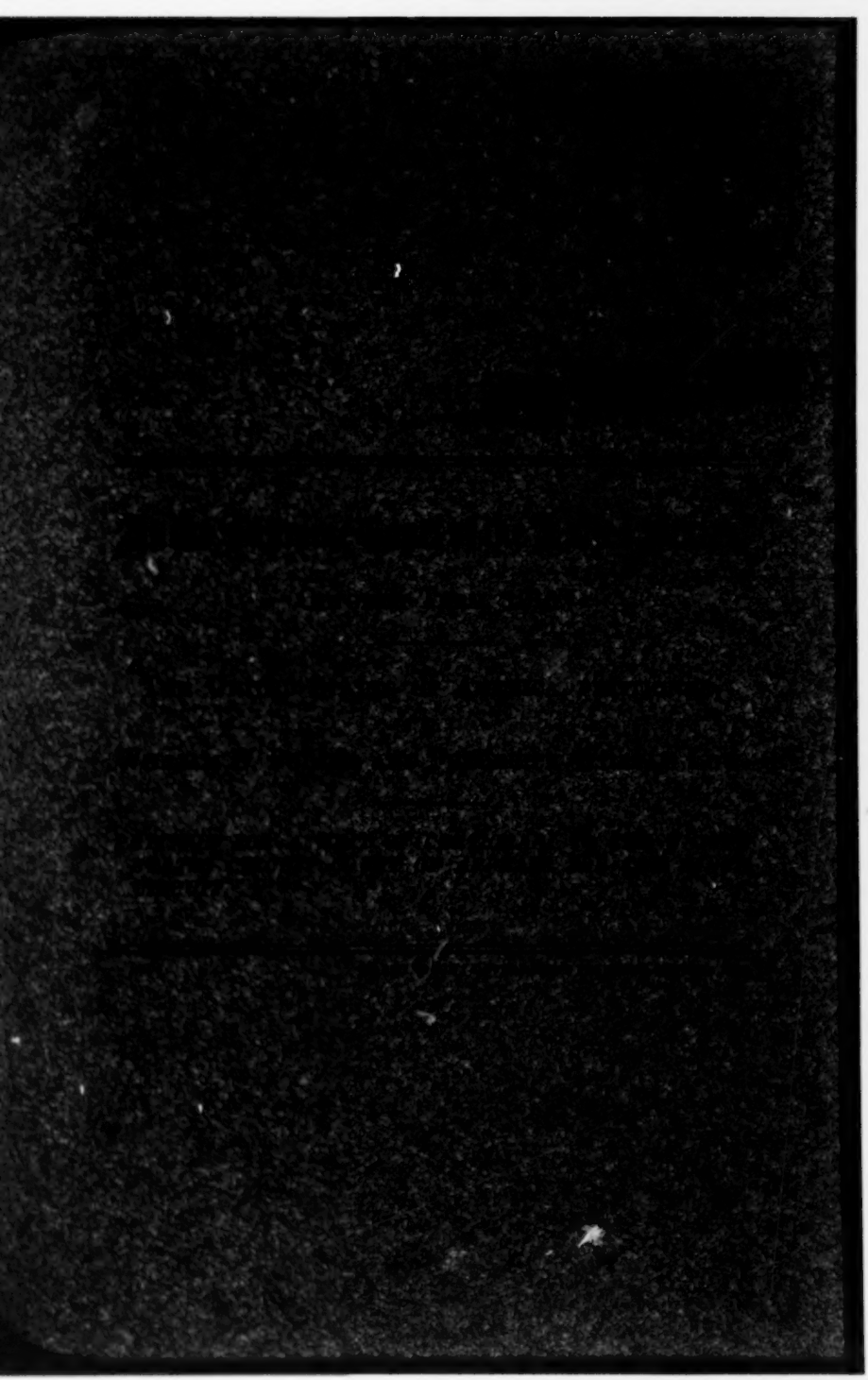
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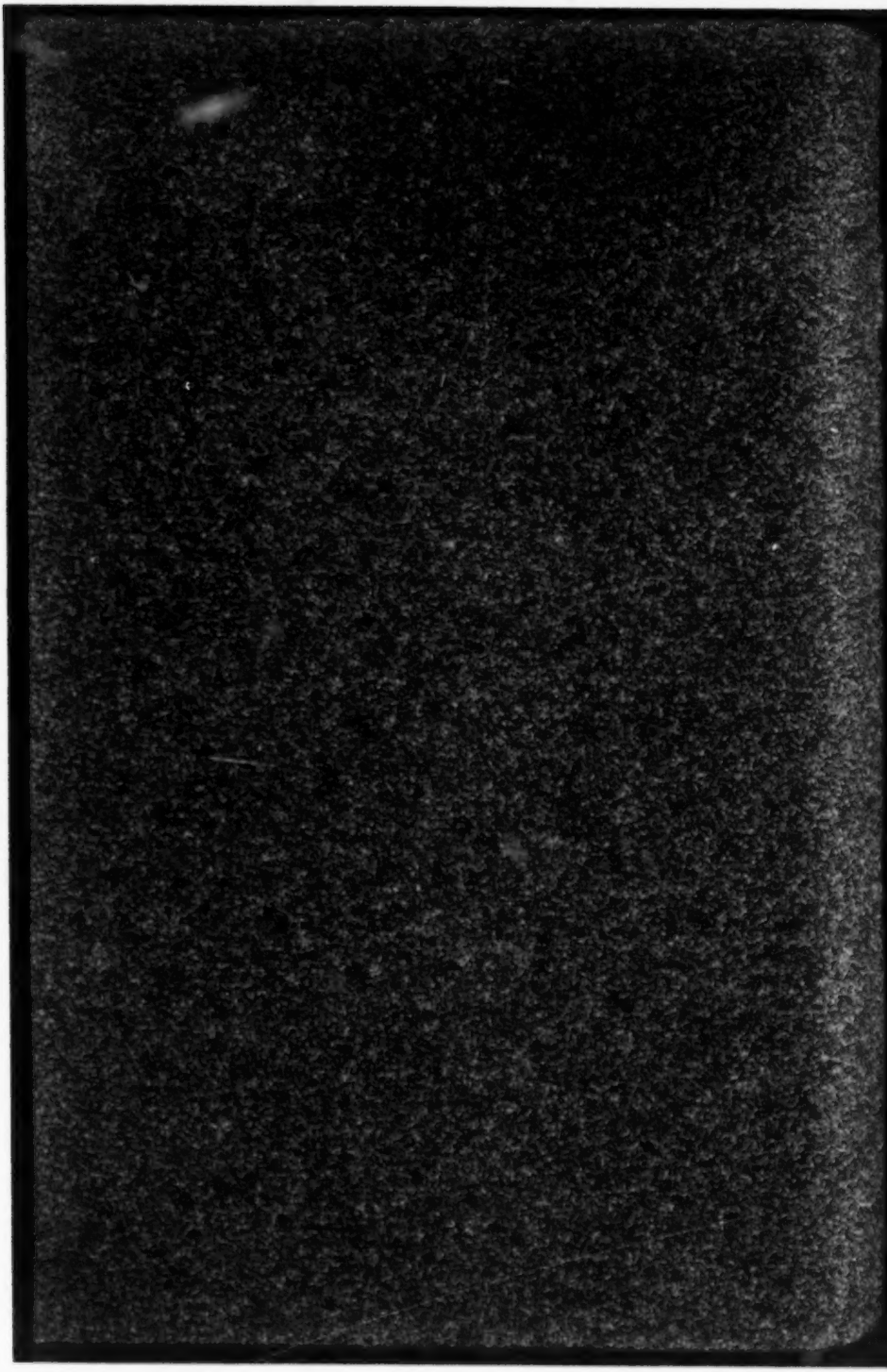
By direction of the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as clerk of said court, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation as to return to writ of certiorari," in which said stipulation it is provided that the certified transcript of the record heretofore filed by the appellant in said cause in the said Supreme Court as a part of its petition for a writ of certiorari may be taken as the return to the said writ of certiorari, the original of which stipulation was filed in my office on this 9th day of May, A. D. 1917.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 9th day of May, A. D. 1917.

[SEAL.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

93 (Indorsed:) File No. 25845. Supreme Court U. S., October term, 1916. Term No. 1015. The United States, petitioner, vs. William B. Poland et al. Writ of certiorari and return. Filed May 15, 1917.





In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA, PETITIONER,
v.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW. } No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in the above-entitled case.

THE FACTS.

On April 26, 1906, William B. Poland entered two tracts of public land in Alaska, one for 159.75 and the other for 160 acres, designated as surveys Nos. 241 and 242, respectively. These entries were made by him as assignee of four soldiers' additional rights, using two thereof for each one of the entries. The two surveys formed one continuous body of land containing approximately 320 acres (R. 6–8). Nearly the entire length of the southern boundary of survey No. 241

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follows the shore line of Resurrection Bay. Survey No. 242 lies immediately north of 241 and does not touch the bay or any navigable water (R. 33). In due time patents were issued on both entries. This suit was brought to cancel the patent issued upon survey No. 242 on the grounds that it was erroneously issued and was obtained by fraudulent representation. The allegation of fraud was based upon the said Poland's affidavit that the land embraced in survey No. 242 was more than 80 rods distant from any other survey or entry under the provisions of the act of May 14, 1898, 30 Stat. 409, which representation misled and deceived the officers of the General Land Office (R. 7, 8). The District Court sustained a demurrer to the bill and dismissed the suit (R. 26–32). The decree was affirmed by the Circuit Court of Appeals for the Ninth Circuit, Judge Rudkin filing a dissenting opinion.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I.

The act of Congress of March 3, 1903, 32 Stat. 1028, provides as follows:

> That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip

> or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law; and provided further, that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right; and provided further, that no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise; * * *

The Government contended, and now contends, that the proviso forbidding the entry of more than 160 acres of lands in Alaska in a single body under soldiers' additional homestead rights is a distinct and independent prohibition meaning exactly what it says and requiring no interpretation or construction. The majority of the court, however, in its opinion, connects this prohibition with the language following, which is intended to protect the lands bordering upon the shores of navigable waters from being entered or patented in continuous bodies. To sustain this view the majority of the court discussed at length the legislative history of the bill; showed that the proviso here relied on first appeared in the bill as a conference committee amendment; referred to the rule that such amendments must be germane to some provision in the bill as passed by one of the Houses, and held that it was germane only to the provision for protecting the shore line, intimating that otherwise it would be void and of no effect. As survey No. 242

does not touch the shore line, the court accordingly held that the patent was valid. It is believed that this view of the statute is erroneous, and that the law is correctly stated in the dissenting opinion of Judge Rudkin.

II.

The Secretary of the Interior has requested that action be taken to secure a review of the decision by this court, saying that the construction of the statute above set forth "is of great importance in the administration of the public lands in the district of Alaska." This court will no doubt take judicial notice of the special efforts made both by Congress and the governmental departments to prevent monopoly and speculative acquisition of the public lands in Alaska. Soldiers' additional homestead rights are assignable (*Webster* v. *Luther*, 163 U. S. 331), and there is no limitation upon the number of such rights that may be purchased by one party and no limitation other than those contained in the statute above quoted upon the quantity of lands that may be entered by means of such rights. It is apparent, therefore, that if the decree of the Circuit Court of Appeals is permitted to stand a very great safeguard against monopoly and speculative acquisition of the public lands in Alaska will be removed.

III.

The court's attention is especially called to the fact that decrees in suits brought to cancel land patents in any of the States of the Union may be

reviewed here on appeal as of right in all cases where the value in dispute exceeds $1,000, besides costs. Judicial Code, secs. 241, 128, 36 Stat. 1133, 1134. Section 134 of the Code, however, declares:

> In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section 247, in which the amount involved or the value of the subject-matter in controversy shall exceed $500, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, *and the judgments, orders, and decrees of said courts shall be final in all such cases.*

This language, taken in connection with the language of section 241, seems clearly to preclude any appeal to this court from a judgment or decree of the Circuit Court of Appeals for the Ninth Circuit in a case of this character, even though, as here, the amount involved exceeds $1,000 and costs. The reason for such a discrimination as against cases arising in Alaska is not apparent, and the suggestion is ventured that possibly it was due to some oversight or inadvertence on the part of Congress. It is believed that the present case is of sufficient importance to justify the issuance of a writ of certiorari, and it is, therefore, respectfully submitted that the writ should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1917.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,
v.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW.
No. 29.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case presents for review a judgment of the Circuit Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Third Division of Alaska dismissing on demurrer a bill filed by the Government to cancel one of two patents issued to William B. Poland on two entries made simultaneously, each embracing 160 acres made by use of soldiers' additional homestead rights, the two aggregating 320 contiguous acres.

The bill, with the exhibits, showed that William B. Poland was the assignee of the unlocated and unentered soldiers' additional homestead rights, acquired from four different parties.

On April 26, 1906, Poland filed at the Juneau, Alaska, land office, simultaneously, two applications, one based on the soldiers' additional homestead rights of two of his assignors, the other on the like rights of the remaining two assignors.

By one application he sought to enter a tract designated as survey No. 241, covering 159.25 acres; by the other, a tract designated as survey No. 242, containing 160 acres. Defendant Poland filed, or caused to be filed, in support of his application for a patent to survey No. 242, an affidavit stating that the land applied for did not exceed 160 acres in extent, fronts less than 160 rods along the shore of any navigable water, and is more than 80 rods distant from any other survey or entry, under the provisions of the act of May 14, 1898 (30 Stat. 409), as amended by the act of March 3, 1903 (32 Stat. 1028). Patents were issued to Poland as follows: For survey No. 241 on January 20, 1908, and for survey No. 242 on March 22, 1909.

The bill alleged that the patent covering survey No. 242 had been obtained by fraud because the allegation in this affidavit that the land covered by survey No. 242 was more than 80 rods distant from any other survey or entry was false, and that the entry was in violation of the express prohibition contained in the act of March 3, 1903, against the location in a single body of more than 160 acres by the use of soldiers' additional homestead rights (R. 4–6).

The defendant Low is made a party as the purchaser of the land in controversy from the patentee, Poland.

Defendants demurred generally to said bill (R. 13, 14). The district court sustained said demurrers, holding substantially that the prohibition of the statute related to the *entry* of more than 160 acres of land in a single body under one application, and that inasmuch as not more than 160 acres was contained in survey No. 242, the entry was not in contravention of law, notwithstanding the fact that it was immediately contiguous to the land embraced in survey No. 241 (R. 14, 23), and was applied for and entered at the same time by the same person. The Circuit Court of Appeals by a divided court (Judge Rudkin dissenting, R. 40) affirmed this judgment (R. 34). The majority held that the limitation in the act of March 3, 1903, restricting the area to be acquired under soldiers' additional homestead rights applied only where the entry lay along the shore of any navigable water. That the bill as originally passed by the House and the Senate did not contain this limitation; that it was added in conference committee; and that as under established parliamentary law a conference committee is not authorized to consider matters not incorporated in the bill as passed by the two Houses of Congress, unless those matters are germane to someting already in the bill, this addition must be construed as relating to the restriction on location along the shore of a navigable water. (Opin-

ion of District Court, R. 14; opinion of Circuit Court of Appeals, R. 34; 231 Fed. 810.)

Assignments of Error.

The assignments of error state that the court erred in dismissing the bill of complaint (R. 25, 26).

Specification of Errors.

The Government contends:

1. The prohibition of the act is so clear as not to permit limitation by construction or interpretation.

2. That the act, properly construed, prohibits the acquisition of more than 160 acres in a single body by the use of soldiers' additional homestead rights, regardless of location or the number of assigned rights presented by the defendant.

3. That the construction of the statute has been followed by the Land Department, is sustained by the history of such legislation as evidencing the congressional intent, and will be persuasive with this court.

4. That the construction of the statute here complained of disregards and renders unnecessary the first proviso of said act.

5. That the affidavit that No. 242 was 80 rods distant from any other survey or entry under the acts of Congress was misleading to the public officers on the question whether more than 160 acres were being entered by Poland in a single body.

I.

ARGUMENT.

Where the language of the act is unambiguous and clear, the obvious meaning controls, and construction or interpretation limiting the same is not permissible.

That part of the act of March 3, 1903 (32 Stat. 1028), material here, is as follows:

> That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: *And provided further*, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further*, That no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more

than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska.

The portion of the act particularly important is the proviso "That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

We contend that the language of this proviso is so plain, certain, and unambiguous as to make limitation thereof by construction erroneous. It is well settled that where the legislative intent is plain and the language is without ambiguity, there is no ground for judicial construction, and that a statute will be enforced according to its obvious meaning. This doctrine has been reiterated often by this court. A few of the later cases are: *United States* v. *First National Bank* (234 U. S. 245, 258); *Mackenzie* v. *Hare* (239 U. S. 299, 307, 308); and *Caminetti* v. *United States* (242 U. S. 470, 485–490).

The opinion in the *Caminetti* case thus states the rule (p. 485):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421.

II.

The language of the act is clear in its restriction of the acreage to be acquired in a single body, by the use of scrip, lieu-selection or soldiers' additional homestead rights.

In the portion of the act of March 3, 1903, relevant to this case, there are five provisos. They provide:

> (1) That no more than 160 acres shall be entered in a single body by such scrip, lieu selection or soldiers' additional homestead right.
>
> (2) No location of scrip, selection or right along any navigable or other water shall be made within the distance of 80 rods of any lands along such water, theretofore located by means of any such scrip or otherwise.
>
> (3) No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions hereof.
>
> (4) No entry shall be allowed extending more than 160 rods along the shore of any navigable water, and along such shore a space of at least 80 rods shall be reserved from entry between all such claims, and nothing herein contained shall be so construed as to authorize entries to be made or title acquired to the shore of any navigable water within said district. (The remaining portion relates to other matters not important here.)
>
> (5) Every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or shall hereafter settle upon any of the public lands . . . situated in the

> district of Alaska . . . with the intention of claiming the same under the homestead laws shall . . . be entitled to enter 320 acres or a less quantity of unappropriated public lands in said district of Alaska.

It is quite clear that the subject matter of the provisos (1) and (5) (our numbers) relate to different subjects.

No. (1) restricts the acreage to be acquired in a single body by the use of scrip, lieu selection, or soldier's additional homestead rights.

One contrasting incident to these several rights and the homestead right spoken of in No. (5) is that scrip, lieu selection, and soldiers' additional rights require no residence to perfect the same. They are an asset like a chose in action, and are subject to sale and assignment at pleasure. No duty of residence or improvement rests on either assignor or assignee. (*Webster* v. *Luther*, 163 U. S. 331, 337, 339, 341.)

The proviso (5) relates solely to a homestead right to be perfected by residence, cultivation, and improvements required of homestead settlers by the homestead laws.

Taking the remaining parts of the statute, the language in proviso (1) is not that "no entry" shall be made containing more than 160 acres. It is "no more than 160 acres shall be entered *in a single body*."

An entry might well be construed to be the "right of entry" of each claimant. This definition is not applicable to the proviso.

The difference of language in this act of 1903 and the former act of May 14, 1898 (30 Stat. 409), is significant. The former act reads "No *entry* (italics ours) shall be allowed extending more than 80 rods along the shore," etc. The present act reads, "No more than 160 acres shall be entered in a single body by such scrip, lieu selection, and soldiers' additional homestead right."

Each soldier, under additional homestead right, would be entitled only to the difference between his original homestead and 160 acres. Each separate claim would therefore be less than 160 acres. (Rev. Stats., sec. 2306.)

These rights were assignable at will, and claims calling for much more than 160 acres in the aggregate could well become the property of one assignee.

Language similar to that inserted in proviso (1) had not existed in the statutes regulating these matters before the act of March 3, 1903. (See dissenting opinion of Rudkin, J., in this case reviewing previous legislation, R. 40–42.)

The conclusion seems to be inevitable that the purpose of this act and the provisos is—

First. To extend to Alaska the homestead system of the United States.

Second. To provide that a *settler* might acquire an original homestead not exceeding 320 acres on complying with the laws as to residence upon the homestead, etc., as contained in said statutes.

No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions of the statute.

Third. That persons seeking to enter lands under scrip, lieu selection, or soldiers' additional homestead rights (such persons not being required by law to reside upon, cultivate, or improve the lands), can not by means of such scrip have more than 160 acres of land entered in a single body; that whether this is attempted by one or two entries (so called) is immaterial.

Fourth. That no patents shall issue until all requirements of law are complied with.

Fifth. That no location by scrip, selection, or right shall be made along the shore of any water within 80 rods of any other located lands along said water.

Sixth. That no entry shall be allowed extending more than 160 rods along the shore; that at least 80 rods along such shore shall be kept free from entry between such claims; that entries of the shore can not be made, or title to such shore acquired.

The District Court placed stress upon the word "entered" in the proviso. The court overlooked the fact that "an entry" is not the thing prohibited, but is that "more than 160 acres shall not be entered in a single body" by the use of scrip, etc. It is clear from the entire proviso that what was aimed at was the prevention of the *acquisition* through soldiers' additional homestead rights of more than 160 acres in a

single body, and not an entry under each separate right without regard to the acreage in a single body which one person might thus acquire.

The District Court in its opinion undertakes to draw an analogy between the provisions here under discussion and the United States Mining Law (R. 16). Under the latter, "*no such location* [placer] *shall include* more than twenty acres for each individual claimant" (R. S. 2331), but "two or more persons, or associations of persons, having contiguous claim of any size * * * may make joint entry thereof, *but no location of a placer claim* * * * *shall exceed* one hundred and sixty acres for any one person or association of persons." (R. S. 2330.) (Italics supplied.)

The District Court points out that such provisions have never restricted a person or association of persons from making two locations immediately adjoining, and holds that the "same reasoning would apply to one case as to another." (R. 16.)

There perhaps would be justification for this view if the provision of law applicable in the instant case read, "No entry under such scrip, lieu selection or soldier's additional homestead right shall exceed one hundred and sixty acres," thus following the provisions of the placer mining law.

But the language under consideration does not follow those provisions. Instead, it provides "that no more than one hundred and sixty acres shall be entered in any single body by such scrip," etc.

By contrast, the difference in meaning is obvious. It is apparent that the provision was designed to prevent the very thing the District Court holds that it sanctions.

This statute did not seek to restrict the right of an individual to more than one claim, but only to prevent an individual from holding more than 160 acres in a single body under scrip, lieu selection, or soldier's additional homestead right.

The argument that it would be useless to provide that not more than 160 acres of land shall be entered in a single body under scrip, etc., if two such locations adjoining each other could be entered and patented, is met in the opinion of the District Court by another reference to placer mining locations.

The court asks why such locations should be limited to 160 acres when two or more may be entered by the same locators notwithstanding the fact that they adjoin each other, and answers this question by stating that a limitation must be made somewhere and that it was probably placed "at 160 acres as being a reasonable area to be included in one location, the presumption being that the additional expense of locating, surveying and other expenses attendant upon holding and patenting the grant will operate as a check on excessive locating or patenting by one individual or association." (R. 16.)

It is apparently overlooked that discovery is made a prerequisite to a mineral location (R. S., 2320, 2329), which requirement of necessity operates as a limita-

tion on the amount of land which such discovery entitles a claimant to locate, whilst in the case of homestead lands acquired under soldier's additional homestead right, the acreage that can be entered thereunder is fixed by the instrument itself before entry is made.

The theory of the District Court is that the two tracts were separate and distinct bodies of land under our system of land measurement. Presumably, the court considered that the imaginary and arbitrary line between the two surveys constituted sufficient separation of the land to exclude them from the inhibition against the acquisition of land in a single body in excess of 160 acres.

It is inconceivable that Congress intended such a construction to be placed on the term "single body," for the provision thus construed would be applicable to no lands other than those contained in the unsurveyed portion of the public domain in Alaska, and, even when so applied, the terms of the provision could be circumvented, as in this case, by causing an official survey to be made (R. 3) before making application to enter the land. Moreover, this construction of the provision would have placed Congress in the position of prohibiting the doing of an act directly, which by indirection it intended to allow.

Since the language of the statute is plain, it was not necessary for the Circuit Court of Appeals to take into consideration the legislative history of the bill as it passed the two houses of Congress, to ascer-

tain the intention of Congress with respect to it. There being no ambiguity or uncertainty in the language of the statute, construction is not permissible.

III.

Even if it be conceded that the language of the statute requires construction, we invoke the rule that due weight should be given to the rulings of the Land Department. These rulings have uniformly been to the effect that the acquisition of land in Alaska by use of soldiers' additional scrip is limited to 160 acres in a single body.

In Circular of Instructions (32 L. D. 424, 426), it was stated:

> The amendatory act does not specifically reenact that portion of the act of 1898 which granted the right to enter *unsurveyed* lands in the district of Alaska under the provisions of law relating to the acquisition of title through soldiers' additional rights, but it is provided thereby "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right," which seems to negative any intention to modify or repeal the existing law with regard to the exercise of such rights in the district of Alaska further than to limit the amount which may be entered in a single body to 160 acres. Further, that portion of the amendatory act which provides that "no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of

> any kind whatsoever shall be located within or exercised upon any lands in said district, except as now provided by law," seems to recognize that there are some such outstanding rights; but, unless soldiers' additional homestead rights are thereby considered as scrip rights, this Department is not advised as to any other law permitting the exercise of any such rights in the district of Alaska. You will therefore continue to receive soldiers' additional homestead applications under sections 2306 and 2307, Revised Statutes, as heretofore, bearing in mind the limitation that not more than 160 acres can be taken in a single body.

In circular dated July 7, 1913 (42 L. D. 213, 214), the following occurs:

> No more than 160 acres shall be entered in any single body by scrip, land warrant, or soldiers' additional right in any part of the District of Alaska, and between any of such claims aggregating more than 160 acres there must be a space of 80 rods.

There are no reported decisions of the Land Department involving this proviso, but there are several decisions of the General Land Office unreported that are in accord with what we understand to be its plain meaning. These rulings and decisions of the executive department charged with its administration are entitled to respect and should be given weight by the courts in considering the statute.

This rule is well stated in *United States* v. *Hammers* (221 U. S. 220) as follows (pp. 228, 229):

> Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

The history of the legislation which resulted in this enactment will be found to support the construction which is contended for by the Government. The Circuit Court of Appeals, in the majority opinion, gives a correct statement of what transpired while the bill was being considered by Congress, but the history thus given is not complete. As first introduced in and passed by the House, the bill provided only for raising the acreage which might be acquired in Alaska under the homestead law from 80 to 320 acres. (H. R. 778, 57th Cong., 1st sess. on H. R. 12098.) See also Congressional Record, volume 36, part I, Fifty-seventh Congress, second session, page 81, which contains the brief discussion of the bill in the House and indicates that only the ordinary homestead entry was considered. When the bill was presented to the Senate Committee on Public Lands, an amendment was made to it which practically was

a rewriting of the bill. An important provision in this amendment was that excepting from the provisions of the bill the allowance of acquisition of title by soldiers' additional homestead rights, and the following specific mention was made of that provision in the Senate (Rept. No. 2755, 57th Cong., 2d sess.):

> Third. All this land is, by the operation of this proposed bill, taken out of the operation of the law which allows the entry of land of like character in the United States and Territories by means of the various classes of land scrip which may now be applied to that purpose.

It passed the Senate in substantially the form presented by the committee (Cong. Rec., vol. 36, pt. 2, pp. 1679–1681, 2028). After the bill went to conference on the nonconcurrence by the House in the Senate amendments, and the insistence by the Senate upon its amendments, the bill was reported by the conferees with amendments, one of them being the proviso against the acquisition of more than 160 acres in a single body under the soldiers' additional homestead rights. In submitting this report to the House, the House conferees made a statement (Cong. Rec., vol. 36, pt. 3, p. 2859, 57th Cong., 2d sess.), the first paragraph of which is as follows:

> The Senate provision prohibiting the use of soldiers' additional homestead rights in Alaska is stricken out, leaving the existing law, and

> also limiting the use of all scrip or lieu selections to tracts of not exceeding 160 acres, and reserving from such locations along navigable or other waters tracts of not less than 80 rods in width between such entries.

From the foregoing it is clearly apparent that the intention of Congress in adopting this amendment was to prohibit the acquisition of more than 160 acres in a single body by means of soldiers' additional homestead rights.

The point made by the Circuit Court of Appeals that under parliamentary law Congress could not put into a bill a provision which was not germane to that already in it, is not important here. That was solely a point of parliamentary practice upon which, on a point of order, the clause as written might have been objectionable. An amendment not germane to a bill is bad on a point of order, but if enacted as a part of the bill is as valid and is to be considered as any other portion of the statute.

The construction given to the language of the first proviso of the act of March 3, 1903, rests upon the supposed presumption that the Congress would not violate the rule prohibiting the insertion of new matter not germane to a provision in one or the other of the conflicting bills. In the first place, it is not clear that the proviso is not germane to that provision of the Senate bill which excepted from its provisions the right to acquire lands in Alaska by means of soldiers' additional homestead scrip. Granting, however, that the proviso was not ger-

mane to any provision in either of the bills, the presumption that the conferees had not violated the rule referred to is a very slender reed to lean upon. The rule referred to has been habitually violated, a fact that recently led to an extended discussion in the Senate. Among other things said about the rule on that occasion are the following (57 Cong. Rec., pp. 5620, 5622):

> It [meaning a conference report] has the right of way; it has a supreme legislative prerogative; it sets aside whatever the Senate is considering; and here is the troublesome thing about it: It may be brought up for immediate consideration by the Senate. It need not be printed; it need not have appeared in type form; it may be 40 pages long; it may deal with everything vital to the future life of the people of this country, regarding heat, light, and power. It may be as important as that; and yet, under the rules, it has the right to brush aside all pending legislation when it first comes into the Senate, and be read from the desk, and the demand made that we proceed to consider and pass upon it.
>
> * * * * *
>
> Mr. La Follette. Suppose a conference report comes in here, like this report, of 20 or 30 pages. It comes in under a privilege that does not require it to be printed. When it is presented it can be read from the desk, and Senators have to sit there and by their ears judge whether new matter has been put in by the conferees or not. What protection is that?

As Judge Rudkin in his dissenting opinion said, it is immaterial how the proviso got into the act; it is sufficient that it is there and was enacted deliberately by Congress. It clearly was put into the bill by way of compromise, the House yielding in its position against the proposition in the bill as passed by the Senate prohibiting entirely the use of soldiers' additional rights in Alaska, and the Senate yielding to the extent of allowing such acquisition within the limitation expressed as to acreage. Such compromises by conferees in attempting to settle differences between the two Houses with respect to proposed legislation are not unusual but are common.

IV.

The construction making the first proviso applicable only to lands lying along navigable water does violence to its plain terms, and involves holding, in effect, that it is superfluous.

The Circuit Court of Appeals is of the opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of land more than 160 acres and not more than 320 acres elsewhere than along the shore." (R. 36.) Granted that this was one of the purposes of the statute, it is clear that such purpose was fulfilled by other provisions (Nos. 2 and 4, our numbers) without the aid of the first proviso, the obvious purpose of which is simply to prevent the acquisition of more than 160 acres in

any single body under scrip, lieu selection, or soldier's additional homestead right. It could have no other purpose, if it is to be given any meaning at all.

The court held that the limitation of 160 acres placed upon the acreage which could be acquired by soldiers' additional rights had application only where the land sought to be entered lay along navigable waters. If this construction be correct, it follows that the proviso was also purposeless for the following reasons:

The act of May 14, 1898 (30 Stat. 409), of which the act of March 3, 1903 (32 Stat. 1028), is an amendment, provided:

> That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; * * * *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims * * *.

The fourth proviso in the act of March 3, 1903, contained the exact language of the proviso in the act of 1898, which is quoted above, except that it allowed an entry to extend along navigable water

160 instead of 80 rods, as in the former act. The Land Department had held under the 1898 act that all entries, whether ordinary homestead or otherwise, were limited to 80 rods along the shore of any navigable water. (Regulations concerning entries, rights of way, timber, etc., Alaska, June 8, 1898; 27 L. D. 248, particularly par. 5, p. 249.) The Land Department having construed the act of 1898 to limit the acquisition of soldiers' additional rights along navigable waters to 80 rods, it is both fair and logical to say that under the fourth proviso of the act of 1903 it would have limited such entries to 160 rods along navigable waters. Congress must be presumed to have legislated with knowledge of the departmental holdings with respect to the acquisition of lands in Alaska. This being so, it follows that proviso No. (1) would be wholly unnecessary if limited to each entry and not to the acreage which could be entered in a single body by the use of soldiers' additional homestead right, etc., and if the sole purpose was to limit the proviso here under consideration to lands lying along navigable waters, and also if the sole thing in the mind of Congress was to prevent a monopolization of the water front, instead of a restriction on the use to be made of such soldier's additional homestead rights, as well as prohibiting all use of them as proposed.

The same is true of the construction of the proviso given by the district court, which appeared to find the word "entered" a stumblingblock to the Gov-

ernment's maintaining the suit. Under the Land Department construction of the act of May 14, 1898, all entries, soldiers' additional or other, were limited to 80 acres in area. (Instructions of June 8, 1898, 27 L. D. 248, particularly par. 6, p. 249; Instructions of December 4, 1902, Secretary of the Interior to Commissioner of the General Land Office, 31 L. D. 441, 442.)

If the word "entered" was intended to be considered in the narrow meaning given it by the district court, Congress need not have enacted the proviso, for any number of entries contiguous to each other away from the shore could have been made under the 1898 act, provided only each individual entry did not exceed 80 acres. There would scarcely be any point in limiting the area under each entry and it certainly would serve no purpose; nor would it have any relevancy to the proposition which was before the Senate and House conferees, namely, whether the use of soldiers' additional rights should be prohibited entirely as to lands in Alaska.

It is clear from the terms of the proviso itself, as well as in the light of the situation, both as to previous legislation and construction by the Land Department, and also in view of the legislative history of the 1903 act, that Congress meant to limit the acquisition of lands under soldiers' additional rights to 160 acres in a single body in Alaska, regardless of whether or not the entry bordered on navigable

water or arose under one or more claims of right presented by a single holder.

The affidavit that survey No. 242 was 80 rods distant from any other survey or entry under said act of Congress was misleading to the public officer in determining whether more than 160 acres were being entered by Poland in a single body. Assuming that the statute prohibited more than 160 acres being located in a single body by one person, by means of more than one application filed simultaneously based on separate assignments, this affidavit made a false statement to the public officer. It in effect stated that these tracts did not constitute a single body.

It stated as to No. 242 that it was 80 rods away from any other survey or entry applied for under said act, when it adjoined No. 241 being then applied for under said act.

Even if the separation of 80 rods was not required between these two tracts to protect the water front, as the court below decides, the affidavit asserted the separation of survey No. 242 from all other surveys and thus asserted a compliance with the limitation on the extent of single bodies permitted to be entered by the use of soldiers' additional homestead rights.

As pointed out by the dissenting opinion, this statement, if false, was a fraud on the officials; if innocent, it was a mistake of fact.

CONCLUSION.

It is respectfully submitted that the decision dismissing the bill of complaint should be reversed and the case sent back for further proceedings thereunder.

ALEXANDER C. KING,
Solicitor General.

FRANK K. NEBEKER,
Assistant Attorney General.

○

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1919

THE UNITED STATES, PETITIONER,

v.

WILLIAM B. POLAND AND FREDERIC WILLIAM LOW

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF WILLIAM B. POLAND AND FREDERICK WILLIAM LOW

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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case presents for review a judgment of the Circuit Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Third Division of Alaska dismissing on demurrer a bill filed by the Government to cancel one of two patents issued to William B. Poland on two entries made simultaneously, each embracing 160 acres made by use of soldiers' additional homestead rights, the two aggregating 320 contiguous acres.

The bill, with the exhibits, showed that William B. Poland was the assignee of the unlocated and unentered soldiers' additional homestead rights, acquired from four different parties.

On April 26, 1906, Poland filed at the Juneau, Alaska, land office, simultaneously, two applications, one based on the soldiers' additional homestead rights of two of his assignors, the other on the like rights of the remaining two assignors.

By one application he sought to enter a tract designated as survey No. 241, covering 159.25 acres; by the other, a tract designated as survey No. 242, containing 160 acres. Defendant Poland filed, or caused to be filed, in support of his application for a patent to survey No. 242, an affidavit stating that the land applied for did not exceed 160 acres in extent, fronts less than 160 rods along the shore of any navigable water, and is more than 80 rods distant from any other survey or entry, under the provisions of the act of May 14, 1898 (30 Stat. 409), as amended by the act of March 3, 1903 (32 Stat. 1028). Patents were issued to Poland as follows: For survey No. 241 on January 20, 1908, and for survey No. 242 on March 22, 1909.

The bill alleged that the patent covering survey No. 242 had been obtained by fraud because the allegation in this affidavit that the land covered by survey No. 242 was more than 80 rods distant from any other survey or entry was false, and that the entry was in violation of the express prohibition contained in the act of March 3, 1903, against the location in a single body of more than 160 acres by the use of soldiers' additional homestead rights (R. 4–6).

The defendant Low is made a party as the purchaser of the land in controversy from the patentee, Poland.

Defendants demurred generally to said bill (R. 13, 14). The district court sustained said demurrers, holding substantially that the prohibition of the statute related to the *entry* of more than 160 acres of land in a single body under one application, and that inasmuch as not more than 160 acres was contained in survey No. 242, the entry was not in contravention of law, notwithstanding the fact that it was immediately contiguous to the land embraced in survey No. 241 (R. 14, 23), and was applied for and entered at the same time by the same person. The Circuit Court of Appeals by a divided court (Judge Rudkin dissenting, R. 40) affirmed this judgment (R. 34). The majority held that the limitation in the act of March 3, 1903, restricting the area to be acquired under soldiers' additional homestead rights applied only where the entry lay along the shore of any navigable water. That the bill as originally passed by the House and the Senate did not contain this limitation; that it was added in conference committee; and that as under established parliamentary law a conference committee is not authorized to consider matters not incorporated in the bill as passed by the two Houses of Congress, unless those matters are germane to someting already in the bill, this addition must be construed as relating to the restriction on location along the shore of a navigable water. (Opin-

ion of District Court, R. 14; opinion of Circuit Court of Appeals, R. 34; 231 Fed. 810.)

Assignments of Error.

The assignments of error state that the court erred in dismissing the bill of complaint (R. 25, 26).

Specification of Errors.

The Government contends:

1. The prohibition of the act is so clear as not to permit limitation by construction or interpretation.

2. That the act, properly construed, prohibits the acquisition of more than 160 acres in a single body by the use of soldiers' additional homestead rights, regardless of location or the number of assigned rights presented by the defendant.

3. That the construction of the statute has been followed by the Land Department, is sustained by the history of such legislation as evidencing the congressional intent, and will be persuasive with this court.

4. That the construction of the statute here complained of disregards and renders unnecessary the first proviso of said act.

5. That the affidavit that No. 242 was 80 rods distant from any other survey or entry under the acts of Congress was misleading to the public officers on the question whether more than 160 acres were being entered by Poland in a single body.

I.

ARGUMENT.

Where the language of the act is unambiguous and clear, the obvious meaning controls, and construction or interpretation limiting the same is not permissible.

That part of the act of March 3, 1903 (32 Stat. 1028), material here, is as follows:

> That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: *And provided further*, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further*, That no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more

than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska.

The portion of the act particularly important is the proviso "That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

We contend that the language of this proviso is so plain, certain, and unambiguous as to make limitation thereof by construction erroneous. It is well settled that where the legislative intent is plain and the language is without ambiguity, there is no ground for judicial construction, and that a statute will be enforced according to its obvious meaning. This doctrine has been reiterated often by this court. A few of the later cases are: *United States* v. *First National Bank* (234 U. S. 245, 258); *Mackenzie* v. *Hare* (239 U. S. 299, 307, 308); and *Caminetti* v. *United States* (242 U. S. 470, 485–490).

The opinion in the *Caminetti* case thus states the rule (p. 485):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421.

II.

The language of the act is clear in its restriction of the acreage to be acquired in a single body, by the use of scrip, lieu-selection or soldiers' additional homestead rights.

In the portion of the act of March 3, 1903, relevant to this case, there are five provisos. They provide:

> (1) That no more than 160 acres shall be entered in a single body by such scrip, lieu selection or soldiers' additional homestead right.
>
> (2) No location of scrip, selection or right along any navigable or other water shall be made within the distance of 80 rods of any lands along such water, theretofore located by means of any such scrip or otherwise.
>
> (3) No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions hereof.
>
> (4) No entry shall be allowed extending more than 160 rods along the shore of any navigable water, and along such shore a space of at least 80 rods shall be reserved from entry between all such claims, and nothing herein contained shall be so construed as to authorize entries to be made or title acquired to the shore of any navigable water within said district. (The remaining portion relates to other matters not important here.)
>
> (5) Every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or shall hereafter settle upon any of the public lands . . . situated in the

> district of Alaska . . . with the intention of claiming the same under the homestead laws shall . . . be entitled to enter 320 acres or a less quantity of unappropriated public lands in said district of Alaska.

It is quite clear that the subject matter of the provisos (1) and (5) (our numbers) relate to different subjects.

No. (1) restricts the acreage to be acquired in a single body by the use of scrip, lieu selection, or soldier's additional homestead rights.

One contrasting incident to these several rights and the homestead right spoken of in No. (5) is that scrip, lieu selection, and soldiers' additional rights require no residence to perfect the same. They are an asset like a chose in action, and are subject to sale and assignment at pleasure. No duty of residence or improvement rests on either assignor or assignee. (*Webster* v. *Luther*, 163 U. S. 331, 337, 339, 341.)

The proviso (5) relates solely to a homestead right to be perfected by residence, cultivation, and improvements required of homestead settlers by the homestead laws.

Taking the remaining parts of the statute, the language in proviso (1) is not that "no entry" shall be made containing more than 160 acres. It is "no more than 160 acres shall be entered *in a single body.*"

An entry might well be construed to be the "right of entry" of each claimant. This definition is not applicable to the proviso.

The difference of language in this act of 1903 and the former act of May 14, 1898 (30 Stat. 409), is significant. The former act reads "No *entry* (italics ours) shall be allowed extending more than 80 rods along the shore," etc. The present act reads, "No more than 160 acres shall be entered in a single body by such scrip, lieu selection, and soldiers' additional homestead right."

Each soldier, under additional homestead right, would be entitled only to the difference between his original homestead and 160 acres. Each separate claim would therefore be less than 160 acres. (Rev. Stats., sec. 2306.)

These rights were assignable at will, and claims calling for much more than 160 acres in the aggregate could well become the property of one assignee.

Language similar to that inserted in proviso (1) had not existed in the statutes regulating these matters before the act of March 3, 1903. (See dissenting opinion of Rudkin, J., in this case reviewing previous legislation, R. 40–42.)

The conclusion seems to be inevitable that the purpose of this act and the provisos is—

First. To extend to Alaska the homestead system of the United States.

Second. To provide that a *settler* might acquire an original homestead not exceeding 320 acres on complying with the laws as to residence upon the homestead, etc., as contained in said statutes.

No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions of the statute.

Third. That persons seeking to enter lands under scrip, lieu selection, or soldiers' additional homestead rights (such persons not being required by law to reside upon, cultivate, or improve the lands), can not by means of such scrip have more than 160 acres of land entered in a single body; that whether this is attempted by one or two entries (so called) is immaterial.

Fourth. That no patents shall issue until all requirements of law are complied with.

Fifth. That no location by scrip, selection, or right shall be made along the shore of any water within 80 rods of any other located lands along said water.

Sixth. That no entry shall be allowed extending more than 160 rods along the shore; that at least 80 rods along such shore shall be kept free from entry between such claims; that entries of the shore can not be made, or title to such shore acquired.

The District Court placed stress upon the word "entered" in the proviso. The court overlooked the fact that "an entry" is not the thing prohibited, but is that "more than 160 acres shall not be entered in a single body" by the use of scrip, etc. It is clear from the entire proviso that what was aimed at was the prevention of the *acquisition* through soldiers' additional homestead rights of more than 160 acres in a

single body, and not an entry under each separate right without regard to the acreage in a single body which one person might thus acquire.

The District Court in its opinion undertakes to draw an analogy between the provisions here under discussion and the United States Mining Law (R. 16). Under the latter, "*no such location* [placer] *shall include* more than twenty acres for each individual claimant" (R. S. 2331), but "two or more persons, or associations of persons, having contiguous claim of any size * * * may make joint entry thereof, *but no location of a placer claim* * * * *shall exceed* one hundred and sixty acres for any one person or association of persons." (R. S. 2330.) (Italics supplied.)

The District Court points out that such provisions have never restricted a person or association of persons from making two locations immediately adjoining, and holds that the "same reasoning would apply to one case as to another." (R. 16.)

There perhaps would be justification for this view if the provision of law applicable in the instant case read, "No entry under such scrip, lieu selection or soldier's additional homestead right shall exceed one hundred and sixty acres," thus following the provisions of the placer mining law.

But the language under consideration does not follow those provisions. Instead, it provides "that no more than one hundred and sixty acres shall be entered in any single body by such scrip," etc.

By contrast, the difference in meaning is obvious. It is apparent that the provision was designed to prevent the very thing the District Court holds that it sanctions.

This statute did not seek to restrict the right of an individual to more than one claim, but only to prevent an individual from holding more than 160 acres in a single body under scrip, lieu selection, or soldier's additional homestead right.

The argument that it would be useless to provide that not more than 160 acres of land shall be entered in a single body under scrip, etc., if two such locations adjoining each other could be entered and patented, is met in the opinion of the District Court by another reference to placer mining locations.

The court asks why such locations should be limited to 160 acres when two or more may be entered by the same locators notwithstanding the fact that they adjoin each other, and answers this question by stating that a limitation must be made somewhere and that it was probably placed "at 160 acres as being a reasonable area to be included in one location, the presumption being that the additional expense of locating, surveying and other expenses attendant upon holding and patenting the grant will operate as a check on excessive locating or patenting by one individual or association." (R. 16.)

It is apparently overlooked that discovery is made a prerequisite to a mineral location (R. S., 2320, 2329), which requirement of necessity operates as a limita-

tion on the amount of land which such discovery entitles a claimant to locate, whilst in the case of homestead lands acquired under soldier's additional homestead right, the acreage that can be entered thereunder is fixed by the instrument itself before entry is made.

The theory of the District Court is that the two tracts were separate and distinct bodies of land under our system of land measurement. Presumably, the court considered that the imaginary and arbitrary line between the two surveys constituted sufficient separation of the land to exclude them from the inhibition against the acquisition of land in a single body in excess of 160 acres.

It is inconceivable that Congress intended such a construction to be placed on the term "single body," for the provision thus construed would be applicable to no lands other than those contained in the unsurveyed portion of the public domain in Alaska, and, even when so applied, the terms of the provision could be circumvented, as in this case, by causing an official survey to be made (R. 3) before making application to enter the land. Moreover, this construction of the provision would have placed Congress in the position of prohibiting the doing of an act directly, which by indirection it intended to allow.

Since the language of the statute is plain, it was not necessary for the Circuit Court of Appeals to take into consideration the legislative history of the bill as it passed the two houses of Congress, to ascer-

tain the intention of Congress with respect to it. There being no ambiguity or uncertainty in the language of the statute, construction is not permissible.

III.

Even if it be conceded that the language of the statute requires construction, we invoke the rule that due weight should be given to the rulings of the Land Department. These rulings have uniformly been to the effect that the acquisition of land in Alaska by use of soldiers' additional scrip is limited to 160 acres in a single body.

In Circular of Instructions (32 L. D. 424, 426), it was stated:

> The amendatory act does not specifically reenact that portion of the act of 1898 which granted the right to enter *unsurveyed* lands in the district of Alaska under the provisions of law relating to the acquisition of title through soldiers' additional rights, but it is provided thereby "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right," which seems to negative any intention to modify or repeal the existing law with regard to the exercise of such rights in the district of Alaska further than to limit the amount which may be entered in a single body to 160 acres. Further, that portion of the amendatory act which provides that "no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of

> any kind whatsoever shall be located within or exercised upon any lands in said district, except as now provided by law," seems to recognize that there are some such outstanding rights; but, unless soldiers' additional homestead rights are thereby considered as scrip rights, this Department is not advised as to any other law permitting the exercise of any such rights in the district of Alaska. You will therefore continue to receive soldiers' additional homestead applications under sections 2306 and 2307, Revised Statutes, as heretofore, bearing in mind the limitation that not more than 160 acres can be taken in a single body.

In circular dated July 7, 1913 (42 L. D. 213, 214), the following occurs:

> No more than 160 acres shall be entered in any single body by scrip, land warrant, or soldiers' additional right in any part of the District of Alaska, and between any of such claims aggregating more than 160 acres there must be a space of 80 rods.

There are no reported decisions of the Land Department involving this proviso, but there are several decisions of the General Land Office unreported that are in accord with what we understand to be its plain meaning. These rulings and decisions of the executive department charged with its administration are entitled to respect and should be given weight by the courts in considering the statute.

This rule is well stated in *United States* v. *Hammers* (221 U. S. 220) as follows (pp. 228, 229):

> Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

The history of the legislation which resulted in this enactment will be found to support the construction which is contended for by the Government. The Circuit Court of Appeals, in the majority opinion, gives a correct statement of what transpired while the bill was being considered by Congress, but the history thus given is not complete. As first introduced in and passed by the House, the bill provided only for raising the acreage which might be acquired in Alaska under the homestead law from 80 to 320 acres. (H. R. 778, 57th Cong., 1st sess. on H. R. 12098.) See also Congressional Record, volume 36, part I, Fifty-seventh Congress, second session, page 81, which contains the brief discussion of the bill in the House and indicates that only the ordinary homestead entry was considered. When the bill was presented to the Senate Committee on Public Lands, an amendment was made to it which practically was

a rewriting of the bill. An important provision in this amendment was that excepting from the provisions of the bill the allowance of acquisition of title by soldiers' additional homestead rights, and the following specific mention was made of that provision in the Senate (Rept. No. 2755, 57th Cong., 2d sess.):

> Third. All this land is, by the operation of this proposed bill, taken out of the operation of the law which allows the entry of land of like character in the United States and Territories by means of the various classes of land scrip which may now be applied to that purpose.

It passed the Senate in substantially the form presented by the committee (Cong. Rec., vol. 36, pt. 2, pp. 1679–1681, 2028). After the bill went to conference on the nonconcurrence by the House in the Senate amendments, and the insistence by the Senate upon its amendments, the bill was reported by the conferees with amendments, one of them being the proviso against the acquisition of more than 160 acres in a single body under the soldiers' additional homestead rights. In submitting this report to the House, the House conferees made a statement (Cong. Rec., vol. 36, pt. 3, p. 2859, 57th Cong., 2d sess.), the first paragraph of which is as follows:

> The Senate provision prohibiting the use of soldiers' additional homestead rights in Alaska is stricken out, leaving the existing law, and

> also limiting the use of all scrip or lieu selections to tracts of not exceeding 160 acres, and reserving from such locations along navigable or other waters tracts of not less than 80 rods in width between such entries.

From the foregoing it is clearly apparent that the intention of Congress in adopting this amendment was to prohibit the acquisition of more than 160 acres in a single body by means of soldiers' additional homestead rights.

The point made by the Circuit Court of Appeals that under parliamentary law Congress could not put into a bill a provision which was not germane to that already in it, is not important here. That was solely a point of parliamentary practice upon which, on a point of order, the clause as written might have been objectionable. An amendment not germane to a bill is bad on a point of order, but if enacted as a part of the bill is as valid and is to be considered as any other portion of the statute.

The construction given to the language of the first proviso of the act of March 3, 1903, rests upon the supposed presumption that the Congress would not violate the rule prohibiting the insertion of new matter not germane to a provision in one or the other of the conflicting bills. In the first place, it is not clear that the proviso is not germane to that provision of the Senate bill which excepted from its provisions the right to acquire lands in Alaska by means of soldiers' additional homestead scrip. Granting, however, that the proviso was not ger-

mane to any provision in either of the bills, the presumption that the conferees had not violated the rule referred to is a very slender reed to lean upon. The rule referred to has been habitually violated, a fact that recently led to an extended discussion in the Senate. Among other things said about the rule on that occasion are the following (57 Cong. Rec., pp. 5620, 5622):

> It [meaning a conference report] has the right of way; it has a supreme legislative prerogative; it sets aside whatever the Senate is considering; and here is the troublesome thing about it: It may be brought up for immediate consideration by the Senate. It need not be printed; it need not have appeared in type form; it may be 40 pages long; it may deal with everything vital to the future life of the people of this country, regarding heat, light, and power. It may be as important as that; and yet, under the rules, it has the right to brush aside all pending legislation when it first comes into the Senate, and be read from the desk, and the demand made that we proceed to consider and pass upon it.
>
> * * * * *
>
> Mr. La Follette. Suppose a conference report comes in here, like this report, of 20 or 30 pages. It comes in under a privilege that does not require it to be printed. When it is presented it can be read from the desk, and Senators have to sit there and by their ears judge whether new matter has been put in by the conferees or not. What protection is that?

As Judge Rudkin in his dissenting opinion said, it is immaterial how the proviso got into the act; it is sufficient that it is there and was enacted deliberately by Congress. It clearly was put into the bill by way of compromise, the House yielding in its position against the proposition in the bill as passed by the Senate prohibiting entirely the use of soldiers' additional rights in Alaska, and the Senate yielding to the extent of allowing such acquisition within the limitation expressed as to acreage. Such compromises by conferees in attempting to settle differences between the two Houses with respect to proposed legislation are not unusual but are common.

IV.

The construction making the first proviso applicable only to lands lying along navigable water does violence to its plain terms, and involves holding, in effect, that it is superfluous.

The Circuit Court of Appeals is of the opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of land more than 160 acres and not more than 320 acres elsewhere than along the shore." (R. 36.) Granted that this was one of the purposes of the statute, it is clear that such purpose was fulfilled by other provisions (Nos. 2 and 4, our numbers) without the aid of the first proviso, the obvious purpose of which is simply to prevent the acquisition of more than 160 acres in

any single body under scrip, lieu selection, or soldier's additional homestead right. It could have no other purpose, if it is to be given any meaning at all.

The court held that the limitation of 160 acres placed upon the acreage which could be acquired by soldiers' additional rights had application only where the land sought to be entered lay along navigable waters. If this construction be correct, it follows that the proviso was also purposeless for the following reasons:

The act of May 14, 1898 (30 Stat. 409), of which the act of March 3, 1903 (32 Stat. 1028), is an amendment, provided:

> That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; * * * *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims * * *.

The fourth proviso in the act of March 3, 1903, contained the exact language of the proviso in the act of 1898, which is quoted above, except that it allowed an entry to extend along navigable water

160 instead of 80 rods, as in the former act. The Land Department had held under the 1898 act that all entries, whether ordinary homestead or otherwise, were limited to 80 rods along the shore of any navigable water. (Regulations concerning entries, rights of way, timber, etc., Alaska, June 8, 1898; 27 L. D. 248, particularly par. 5, p. 249.) The Land Department having construed the act of 1898 to limit the acquisition of soldiers' additional rights along navigable waters to 80 rods, it is both fair and logical to say that under the fourth proviso of the act of 1903 it would have limited such entries to 160 rods along navigable waters. Congress must be presumed to have legislated with knowledge of the departmental holdings with respect to the acquisition of lands in Alaska. This being so, it follows that proviso No. (1) would be wholly unnecessary if limited to each entry and not to the acreage which could be entered in a single body by the use of soldiers' additional homestead right, etc., and if the sole purpose was to limit the proviso here under consideration to lands lying along navigable waters, and also if the sole thing in the mind of Congress was to prevent a monopolization of the water front, instead of a restriction on the use to be made of such soldier's additional homestead rights, as well as prohibiting all use of them as proposed.

The same is true of the construction of the proviso given by the district court, which appeared to find the word "entered" a stumblingblock to the Gov-

ernment's maintaining the suit. Under the Land Department construction of the act of May 14, 1898, all entries, soldiers' additional or other, were limited to 80 acres in area. (Instructions of June 8, 1898, 27 L. D. 248, particularly par. 6, p. 249; Instructions of December 4, 1902, Secretary of the Interior to Commissioner of the General Land Office, 31 L. D. 441, 442.)

If the word "entered" was intended to be considered in the narrow meaning given it by the district court, Congress need not have enacted the proviso, for any number of entries contiguous to each other away from the shore could have been made under the 1898 act, provided only each individual entry did not exceed 80 acres. There would scarcely be any point in limiting the area under each entry and it certainly would serve no purpose; nor would it have any relevancy to the proposition which was before the Senate and House conferees, namely, whether the use of soldiers' additional rights should be prohibited entirely as to lands in Alaska.

It is clear from the terms of the proviso itself, as well as in the light of the situation, both as to previous legislation and construction by the Land Department, and also in view of the legislative history of the 1903 act, that Congress meant to limit the acquisition of lands under soldiers' additional rights to 160 acres in a single body in Alaska, regardless of whether or not the entry bordered on navigable

water or arose under one or more claims of right presented by a single holder.

The affidavit that survey No. 242 was 80 rods distant from any other survey or entry under said act of Congress was misleading to the public officer in determining whether more than 160 acres were being entered by Poland in a single body. Assuming that the statute prohibited more than 160 acres being located in a single body by one person, by means of more than one application filed simultaneously based on separate assignments, this affidavit made a false statement to the public officer. It in effect stated that these tracts did not constitute a single body.

It stated as to No. 242 that it was 80 rods away from any other survey or entry applied for under said act, when it adjoined No. 241 being then applied for under said act.

Even if the separation of 80 rods was not required between these two tracts to protect the water front, as the court below decides, the affidavit asserted the separation of survey No. 242 from all other surveys and thus asserted a compliance with the limitation on the extent of single bodies permitted to be entered by the use of soldiers' additional homestead rights.

As pointed out by the dissenting opinion, this statement, if false, was a fraud on the officials; if innocent, it was a mistake of fact.

CONCLUSION.

It is respectfully submitted that the decision dismissing the bill of complaint should be reversed and the case sent back for further proceedings thereunder.

ALEXANDER C. KING,
Solicitor General.

FRANK K. NEBEKER,
Assistant Attorney General.

○

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1919

THE UNITED STATES, PETITIONER,

v.

WILLIAM B. POLAND AND FREDERIC WILLIAM LOW

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF WILLIAM B. POLAND AND FREDERICK WILLIAM LOW

THE ARGUS PRESS, SEATTLE

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STATEMENT OF THE CASE

In view of the allegations of fraud contained in the amended complaint in this case, the Respondents deem it important to correct an inadvertent error in the Statement of the Case as set forth in the brief for the United States. On page two of the brief, it is stated that the affidavit alleged to contain a false statement recited that the land in question, among other things, "is more than eighty rods distant from any other survey or entry under the provisions of the Act of May 14,

1898, (30 Stat. 409) *as amended by the Act of March 3, 1903, (32 Stat. 1028).*"

The affidavit did not contain the words italicized. (R. 4.)

Comment upon this important distinction will be made in the course of the argument.

ARGUMENT

Considering the purpose of the affidavit and the actual Statute to which it referred it was neither false nor incorrect.

The defendant Poland had received from the United States a patent for the premises included in Survey Number 241, as shown upon the plat inserted between pages thirty-eight and thirty-nine of the record, being lands within the Territorial District of Alaska. Said Patent was issued January 20, 1908. (R. 4.)

On March 22, 1909, the defendant Poland secured from the United States a patent for the premises described as Survey Number 242, also shown on the plat above referred to; and for the cancellation of which patent this action was brought; no such action, however, being taken with reference to the patent for Survey Number 241.

The applications for the allowance of both entries were made at the same time. (R. 4.)

Did the defendant Poland by reason of the location and entry of these two tracts, one of which contained one hundred fifty-nine and seventy-five hundredths acres of land, and the other of which

contained one hundred and sixty acres of land, *fraudulently* acquired from the United States more than one hundred sixty acres of land by one entry in a single body as prohibited by the Act of May 14, 1898, as amended by the Act of March 3, 1903? (32 Stat. 1028.)

The respondents contend that fraud is an essential part of the case for the United States in the absence of an allegation of the return, or a tender thereof, of the consideration paid for the patent.

The act of fraud alleged in the amended complaint is that the defendant Poland at the time of the filing of his application for the entries of the tracts in question filed with the officers of the land office an affidavit which contained the following language:

> "Said tract of land (referring to the land embraced in said survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than *eighty* rods distant from any other survey or entry under the *provisions of said Act of May 14th, 1898.*" (Italice ours.)

And that such statement was false and misled the officers of the various land departments and induced them to issue the patent for Survey Number 242.

Manifestly the statement that Survey 242 did not contain more than one hundred and sixty acres was not false. Nor is the statement that

said Survey 242 is in frontage less than one hundred and sixty rods along the shore of any navigable water false, for the plat shows that it has no frontage on any water.

But it is urged that the further statement "that it is more than eighty rods distant from any other survey or entry *under the provisions of the Act of May 14, 1898*" is false.

Is it? This brings us to the correction suggested by the respondents as to the statement of the case in the Brief for the United States. If we add to what the affidavit really says, the words italicized in our correction of the record, to-wit: "As amended by the Act of March 3, 1903," we not only fall into the same error as counsel for the United States, but we make the affidavit refer to another, and for the purposes of the question of fraud, a totally different law. Whether or not the affidavit in question was made upon a form prepared by the land office with reference to the Act of May 14, 1898, it bears upon its face most persuasive evidence that it was drawn only with relation thereto; for the act referred to places no limitations whatever upon the amount of land which may be entered by soldiers additional homestead right except as regards lands along the shore of navigable waters, and this provision is repeated as a part of the enacting clause and repeated as a proviso to sections two and ten of said act of May 14, 1898. (Supp. Rev. Stat.

Vol. 2, p. 755. 30 Stat. at L. 409.) Read as it was actually written and applied to the lands to which it referred, the affidavit is exactly true. Indeed, we do not believe that the Court will seriously consider its having been intended for any other purpose than exactly as above suggested.

The amendatory act of 1903, which is Section 101 Compiled Laws of Alaska, 32 Stat. L. p. 1028, reads as follows:

> Section 101. "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act and all rights incident thereto, are hereby extended to the District of Alaska, subject to such regulation as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any grant outside of the District of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law; and provided further that no more than one hundred and sixty acres shall be *entered* in any *single body* by such scrip, lieu selection, or soldier's additional homestead right; provided further that no location of scrip, selection, or right along any navigable or other waters shall be made *within the distance of eighty rods of any lands, along such waters, theretofore located* by means

of any such scrip or otherwise; and provided further that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof; Provided, That *no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims;* and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof except as to commuted lands as herein provided."

It will be seen that under the provisions of the Statute above quoted no location of scrip, selection, or soldier's right, *along navigable or other waters*, shall be made within the distance of eighty rods of any lands *along such waters* theretofore located by means of any such scrip *or otherwise.*

We do not find, however, any provision of the law in said section, nor has our attention been called to any provision of the law anywhere, which

prohibits an entryman from taking up land within eighty rods, or any other distance, from any other land therefore located by him, or any one else, *except along navigable waters.*

A reference to the plat at once discloses the fact that Survey No. 242 is not along any navigable or other water. (R. 33.)

We think, therefore, that we may disregard the immaterial statement referred to in the affidavit, to the effect that Survey No. 242 is more than eighty rods distant from any other survey, or entry, under the provisions of the Act of May 14th, 1898.

The maker of the affidavit, and the defendant Poland, were attempting to comply with the requirements of the Act of May 14, 1898, with reference to the location of claims along the shore and were not otherwise making reference to the relative location of the claims to each other.

As a matter of fact, read in connection with the Act of May 14, 1898, to which it refers, the affidavit is entirely accurate, for it is obvious that within the meaning of that act, i. e., along the shore of any navigable or other water, Survey No. 242 is not within eighty rods of any other entry.

It has been contended in the lower courts in the language of the Amended Complaint:

> "That the said statement was false and fraudulent in that it concealed from the officials of the Land Department of the

> United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier's additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed."

The plaintiff further alleges that this fraud deceived the various officers of the Government including the officials of the Land Department and the President of the United States as to the quantity of land included therein.

If these two surveys do not constitute a single entry, the statement is wholly immaterial. If, on the other hand, they do constitute a single entry, the statement is absurd on the face of the surveys, descriptions and plats. The language of the affidavit is not that the land sought by entry, under Survey No. 242, is not in excess of 160 acres, *including* the prior entry under Survey No. 241. It is, that the survey in question, No. 242, does not exceed 160 acres, which statement is true.

It has been suggested that notwithstanding the apparent purpose of the affidavit, and the reference to the Act in compliance with which it was made, yet the statement that Claim No. 242 is more than 80 rods distant from any other survey, or entry, under the provisions of said Act, might lend color to the impression in the minds of the Government officials, that Claim

No. 242 could not be a part of another entry in any event, because it was at least 80 rods distant from any other claim.

It is hard to conceive of such an idea in the mind of any Government official when we take into consideration the following language contained in the patent itself:

> "Beginning at Corner No. 1 near the North shore of Resurrection Bay, identical with Corner No. 5 U. S. Survey No. 241." (R. 9.)

(It will be noted that corner No. 1 is not on the shore.)

This is the language contained in the introductory clause of the patent, which is now sought to be annulled, and which is set forth as Exhibit "B" to the complaint herein.

In other words, this patent shows upon its face as did the survey upon which it was based, that these two location—these two claims—were identical in a common corner, and that they abut each other on a line drawn East and West.

To say that the affidavit under such circumstances, deceived the land office officials, is to accuse them of a lack of ordinary intelligence, a supposition which seems to us impossible to be entertained.

We submit therefore that the facts pleaded are wanting in an allegation of either fraud intended or exercised or relied upon.

II.

The language of the act does not prohibit two adjoining entries of separate surveys and tracts.

We submit that the language of the Act of March 3, 1903, above referred to, is not vague or ambiguous or in need of interpretation, and that only an attempt to construe it against the plain meaning of simple english has made possible the bringing of this action.

All bodies of land except such as nature divides are subject to division only by the intangible lines created by man. Whether a portion of the earth's surface is one body of land or is composed of several bodies is dependent upon human action; whether we have made such portion into several depends upon our arbitrary survey. To say that two land descriptions having a common boundary line must *ipso facto* constitute one body of land, if carried to its logical conclusion would eliminate all boundaries in many instances and make of a whole State or County one body of land. The divisions between private owners; the boundaries of states and nations are no more or less. The survey of these two tracts by the Government engineers and their separate entry by the respondent Poland; the patent by the government of first one, and a year later of the other, were all acts evidencing and confirming the creation of separate tracts.

It has been urged that the result thus contended

for, does by indirection what the statute was intended to prohibit. We submit that this position is based upon the assumption that the pleader incorporates into his argument not what the statute says, but what he *thinks* Congress proposed to do.

What the purpose of Congress was in enacting this statute might be an interesting speculation, but it does not assist in support of the argument that our entering one hundred sixty acres in each of two bodies under two separate surveys, applications and all the subsequent proceedings leading up to two patents issued more than a year, a part in time, violated the plain language of the statute in question.

In passing it may be noted that the real purpose of the bill as introduced in Congress was to extend the homestead laws in Alaska increasing the acreage which could be located by one person to three hundred twenty acres. This and the safe-guarding of the approaches to navigable waters would seem to have been the final purposes in view as shown by references to the Congressional Record set forth in the opinion of the Circuit Court of Appeals. (R. 38.)

III.

There have been no authoritative official decisions or opinions of the Land Department upon the question at issue entitled to weight before this Court.

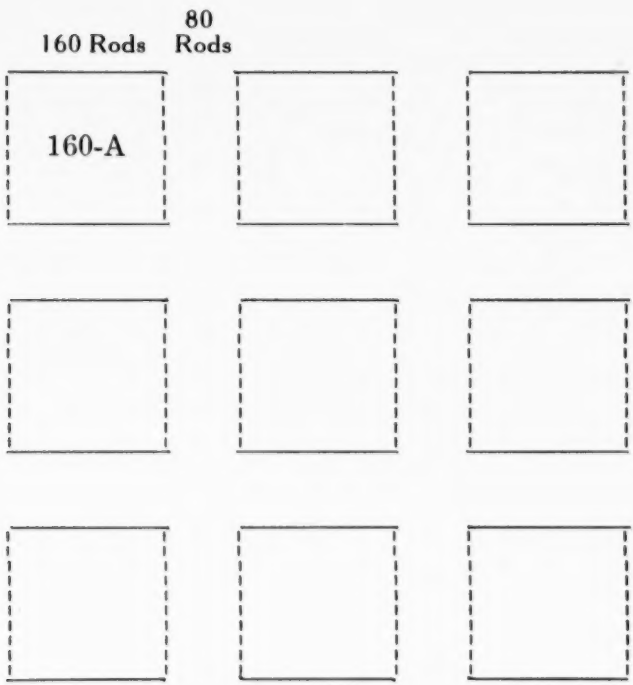
It has been urged at great length in the

court below that the Land Department of the United States has placed a construction upon the law now invoked for the cancellation of the patent in question and that such interpretation should have weight with the Courts in construing the same, and the inference follows that the language of the statute must be in need of such assistance in spite of the contention to the contrary. Indeed certain informal, and, as we think, wholly *ex parte* opinions of officers of the Land Department have been quoted in the briefs in the lower Court. The respondents are unadvised as to any official rulings of the department covering the point at issue in this case.

However, if weight is to be given to the decisions of the Land Department upon the theory that the act under consideration is in need of construction, what more persuasive decision can we obtain than the action of the Department in granting us the very patent under discussion? Indeed, the action of the Land officers of the Government not only persuade us of the good faith of the applicant in the beginning, but of the entire concurrence of the Land Department in our opinion at the time when the entries were made and the patents subsequently issued, that the entryman was clarly entitled to make the two entries alongside of each other.

The Department, when our patent was issued, agreed with our present contention.

Now, it is urged that not only is one entryman prohibited from taking up adjoining locations, but that no one can enter a location within eighty rods of any other location irrespective of its relation to navigable waters. The result of such an interpretation of the law results in the following checkerboard.



Such a procedure not only serves no useful purpose, but impairs the utility of the intervening spaces.

We think we need hardly comment further upon the effect of such a ruling if carried out to its legitimate conclusion, and applied to a territory like Alaska, almost wholly unsurveyed and having an area of over five hundred and ninety thousand square miles, with a population of one individual to every ten square miles.

On the other hand, a glance at the map instantly apprises one of the fact that access to the interior of this vast and almost untenanted domain is only possible at a very few natural harbors where the sea meets the land on anything like a level strand.

It would not appear to be necessary to say more as to the propriety of this eighty-rod reservation between claims on navigable waters, and which Congress has made a part of the law.

The contrast with reference to lands not on navigable waters and the consequent Congressional intent in plain.

Whatever weight may be attached to the long continued and established decisions of the Land Department, and we are not unmindful of the decisions of this Court thereon, yet we submit that in the instant case no such established decisions are available, the only real decision being the one in our favor when the patent was granted.

IV.

By analogy the administration of the mining laws by the department for many years supports our contention that we are within not only the letter but the spirit of the law.

The respondents are quite confident that the plain language of the statute can not be successfully attacked by seeking to interpret it in the light of a supposed public policy, even assuming that it were possible to present a convincing theory thereof.

But even if we accept that ground of debate, we submit that the established policy of the Government in an analogous statute or succession of statutes, still affords us support.

We refer to the law with regard to placer mining claims (Rev. Stat. 2330) which prohibits the location of claims exceeding one hundred sixty acres in extent by any one person or association of persons.

We think it will be admitted that the common practice of the Department has permitted adjoining claims to be located by such persons or associations in Alaska, at least prior to the Act of August 1st, 1912.

Conceding for the sake of argument, the policy of the Government to discourage the aggregation of large holdings in a few hands, we see no greater danger of monopolization in the non-mineral lands of Alaska than in the mineral lands.

Both are of vast extent and almost wholly

unoccupied. It has been contended that the necessity of discovery and location as to mineral lands might constitute a distinction as regards mining locations. But in view of the fact that the mineral belts in Alaska are of such large dimensions as to cover many square miles in continuous extent, the discovery and location consist mainly in surveying claims upon the same mineral belt.

As to the principles which in the last analysis should apply to the peculiar facts of this case, failing any sufficient allegation of fraud; we respectfully cite the opinion in the case of *Atlantic Delaine Company vs. James*, 94 U. S. p. 207. Mr. Justice Strong uses the following language:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

This case was quoted in the case of *U. S. vs. Maxwell Land Grant Company*, 121 U. S., p. 325; and on pages 380-381 Mr. Justice Miller uses the following language:

> "We take the general doctrine to be that

> when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal."

V.

Assuming that the granting of the patent to survey 242 resulted from a mistake of fact and law in the minds of the officers of the Land Department, but without any act of fraud on the part of respondent, Poland, we urge that the complaint is open to demurrer for want of an allegation of the return or tender of the return of the consideration paid for the entry.

If fraud were found to exist on the part of the respondents, no contention would be made that a tender is necessary. The decisions of this Court in the case of the *United States vs. Trinidad Coal and Coking Co.*, 137 U. S. 160, and the recent case of *Causey vs. the United States*, 240 U. S. 399, are conclusive upon that point. But if no fraud is found, we submit that the government

should be bound to do equity the same as any other litigant.

In this case there is no presumption that the United States sold the premises for a nominal consideration under the policy of stimulating the development of latent mineral resources, and that the real consideration to the entryman was the opportunity to profit out of the exploitation thereof.

In fact, the entryman here was the assignee of the most worthy class of citizens, who for the secrifices made for their country in time of war were granted the slight compensation involved in the land right exercised by the assignee herein. To belittle the worth of his standing is to attach the same character to that of his soldier assignor. Moreover, while the facts in this case do not come within the terms thereof insomuch as our entry had gone to patent, we desire to call the Court's attention to the Act of June 16, 1880 (21 Stat. at L. 287, Paragraph 2, Chap. 244):

> "In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same,

upon the surrender of the duplicate receipt and the execution of a proper relinqiushment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office."

Stripped of any sufficient allegation of fraud, we earnestly urge upon the Court the great injustice which the granting of the relief asked herein must inflict upon one who is thereby made the victim of a mutual mistake wherein his position has been supported by the concurring opinions of officers of the Land Department through all stages, and by the far higher authority of the Courts so far.

In view of the statute above referred to and the policy of the Government announced therein, we submit that this is far more appealing to the spirit of a Court of Equity than the ordinary rule with regard to cases involving fraud.

What the Congress has seen fit to expressly provide where theproceedings have not gone to Patent, and where the Government can withdraw of its own accord, ought not a Court of equity to require as a condition for the destruction of our position wherein we are not at fault; and more especially when the statute provides for the return of the expenses incurred, whereas we have paid those and the purchase price as well. While recognizing the principle laid down in the case of *Causey*

vs. the United States, we think the instant case distinguishable therefrom and cite from the opinion in the case of *Brent vs. Bank of Washington*, 35 U. S. 10, Pet. 596, 615:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief, to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in *The United States vs. Mitchell* (9 Peters, 743), have recognized the principle in the common law that through the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. (2 Co. Inst., 573; 2 Vess., Sen., 296, 397, Hard., 60, 460.) This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject. (7 Co., 19; 6 Hard, 27, 170, 230, 502; 4 Co. Inst. 190.)"
>
> "There is no reason why the United States should be exempted from a fundamental rule of equity."

The principles announced therein have not

wanted in application to cases brought to cancel land patents. This case was cited and followed in State vs. Morgan (52 Ark. 157) which held a bill in equity by which the state sought to cancel a patent, insufficient unless it offers to restore the purchase price, and in the case of *State vs. Snyder*, (66 Tex. 700) which held that the state must tender the purchase money as a pre-requisite to recovery of title.

VI.

The complaint is wanting in the necessary allegations to charge the Respondent Low with knowledge of or to subject his title to the infirmities or irregularities of the entryman's title.

The allegations of the complaint in this case set forth the transfer from Poland to Low in paragraph eight thereof, (R. 6) in language which must be conceded to admit that Low was a purchaser for value of the premises in question, subsequent to the issuance of the patent. The language is, that the Respondent Poland "conveyed, bargained, sold and confirmed * * * to the Defendent Low and to his heirs and assigns the lands in question," with a covenant of general warranty.

There is no allegation in the complaint that the Respondent Low had any knowledge whatsoever of the alleged defects in the title, or of the facts set forth in the complaint.

In the case of *U. S. vs. Detroit Timber & Lumber Co.*, 200 U. S. 321, this court held that a purchaser from an entryman was not charged with knowledge of the wrongful character of the acts of the entryman. Mr. Justice Brewer in the course of the opinion at page 331 says:

> "We do not understand the law to be as stated, or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business."

In said opinion the Court quotes with approval from *Wilson vs. Wall*, 73 U. S. 83:

> "A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only refer to Sugden on Vendors, p. 622, where he says: 'In *Ware vs. Egmonth*, 4 De G. M. & G. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject

of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence'."

The Court further on page 339, says:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions."

It is respectfully submitted that the decision

sustaining the demurrer should be sustained.

IRA BRONSON,

H. B. JONES,

Attorneys for Respondents.

Counsel for the United States.

UNITED STATES *v.* POLAND ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 29. Argued November 19, 1919.—Decided January 5, 1920.

A bill to set aside a patent partly because of a false representation alleged to have been made in an affidavit filed with the land officials, *held* not sustainable upon the ground of fraud, it appearing from the affidavit as set forth that the representation was not as alleged, and the bill also showing that the fact in question was clearly disclosed by the application and other entry papers. P. 224.

But where the facts alleged show that the patent was issued in violation of law the bill states a case for cancellation. P. 227.

The Act of March 3, 1903, c. 1002, 32 Stat. 1028, in providing that "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights, in Alaska, while leaving the holder of several such rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than 160 acres in a single body, whether through one or more entries. P. 225.

This provision is wholly distinct from the provision of the same act limiting entries to 160 rods along the shores of navigable waters and reserving 80 rods of shore between claims. P. 227.

The defense of *bona fide* purchase must be set up and established affirmatively by the defendant in a suit to set aside a patent. *Id.*

One who without fraud has secured a patent, by means of soldiers' additional homestead rights, which is canceled because issued in violation of law, is free to exercise the rights by which it was obtained, and, under the Act of June 16, 1880, c. 244, 21 Stat. 287, may apply for repayment of the fees and commissions paid to the land officers. P. 228.

231 Fed. Rep. 810, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Nebeker, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Ira Bronson and *Mr. George H. Patrick*, with whom *Mr. H. B. Jones* was on the brief, for respondents. Among the points presented by them was the following:

Assuming that the granting of the patent to survey No. 242 resulted from a mistake of fact and law in the minds of the officers of the Land Department, but without any act of fraud on the part of the patentee, the complaint is open to demurrer for want of an allegation of the return or tender of the return of the consideration paid for the entry. Act of June 16, 1880, c. 244, 21 Stat. 287; *Brent* v. *Bank of Washington*, 10 Pet. 596, 615; *State* v. *Morgan*, 52 Arkansas, 157; *State* v. *Snyder*, 66 Texas, 700. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Causey* v. *United States*, 240 U. S. 399, distinguished.

Mr. Justice Van Devanter delivered the opinion of the court.

This is a suit to cancel a patent issued to William B. Poland for one hundred and sixty acres of land in Alaska, the gravamen of the complaint being that by this and another patent, both based upon soldiers' additional homestead rights, Poland acquired a single body of land of larger acreage than was permitted by the statute under which the patents were sought and issued. The defendants, who were the patentee and another claiming under him, separately demurred to the complaint, and the court sustained the demurrers and dismissed the suit. That decision was affirmed by the Circuit Court of Appeals, one judge dissenting, 231 Fed. Rep. 810, and the case is here on writ of certiorari.

Of course, it rested with Congress to determine whether, when, and with what restrictions the general land laws should be extended to Alaska. For many years there was no affirmative action upon the subject. The first steps consisted of limited extensions of the laws relating to mining claims, c. 53, 23 Stat. 24, § 8, and town sites, c. 561,

26 Stat. 1095, § 11; but with these we are not now concerned. The homestead laws were the next to receive attention. By the Act of May 14, 1898, c. 299, 30 Stat. 409, they were extended to that district with the restrictions (a) that "no homestead" should exceed eighty acres in extent and (b) that "no entry" should extend more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods should be reserved from entry between all such claims. And by the amendatory Act of March 3, 1903, c. 1002, 32 Stat. 1028, the extension of the homestead laws was repeated and confirmed, but with the qualifications (a) that an *actual settler* intending to comply with the requirements in respect of continued residence, cultivation, etc., should be entitled to enter three hundred and twenty acres or a less quantity, (b) that "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights, and (c) that "no entry" should extend more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods should be reserved from entry between all such claims. Further restrictions were imposed, but there is no present need for noticing them.

The controversy here is over the meaning and purpose of the provision that no more than one hundred and sixty acres shall be entered in any single body by means of soldiers' additional homestead rights.

The material facts to be gathered from the complaint are these: Poland, who was the assignee of certain soldiers' additional homestead rights entitling their owner to enter and acquire in the aggregate 319.75 acres, wished to use them in entering and acquiring certain land in Alaska. The regular public surveys had not been extended to that locality, so he caused a special survey of the land to be made at his expense, as was permitted by applicable

regulations. 32 L. D. 424; 28 L. D. 149. By that survey the land, which was in a compact or single body, was divided into two tracts—one of 159.75 acres, designated as survey No. 241, and the other of 160 acres, designated as survey No. 242. As surveyed the north boundary of one tract was the south boundary of the other, and this was shown in the surveyor's return. On April 26, 1906, after the survey, he presented at the local land office two applications whereby he sought to make separate entries of the two tracts with his soldiers' additional rights—some of the rights being used on one tract and the others on the other tract. The applications were approved and passed to entry and patent—the patent for the 160 acres being issued a considerable period after the other.

In these circumstances the complaint charges that the 319.75 acres, although surveyed in the form of two tracts, were but a single body of land in the sense of the provision in question; that the land officers in passing both applications to entry and patent acted upon a misconception of the law and of their authority, and that in consequence the later patent, whereby Poland's acquisition was made to exceed one hundred and sixty acres in a single body, was issued in violation of law and should be canceled.

The complaint also contains an allegation that that patent was fraudulently procured in that among the proofs presented to the land officers was an affidavit falsely representing, in effect, that the two tracts were more than eighty rods apart, when in truth they were adjoining tracts. But this allegation must be put out of view, first, because the words of the affidavit as set forth in the complaint do not sustain the pleader's conclusion as to what was represented, and, second, because the complaint makes it certain that the application and other entry papers clearly disclosed that the two tracts were contiguous to the extent of having a common boundary one-half mile in length.

In approaching the consideration of the provision whose meaning and purpose are in question it is well to recall what soldiers' additional homestead rights are and what use could be made of them outside Alaska when the provision was adopted. They are rights to enter and acquire unappropriated non-mineral public land without settlement, residence, improvement or cultivation, and without payment of any purchase price. They are not personal to the original beneficiaries but are transferable at will, and the number that may be assigned to the same person is not limited. A single right is always for less, and generally much less, than one hundred and sixty acres, but rights aggregating many times that number of acres may be and often are held by a single assignee. When the provision was adopted there were almost no restrictions upon the use of such rights outside Alaska. Indeed, the only restriction of any moment was one, uniformly respected, preventing the inclusion of more than one hundred and sixty acres in a single entry. But the number of such entries that might be made by the same person was not restricted, nor was there any limitation upon the amount of land in a single body that might be entered in that way. Thus an assignee having rights aggregating six hundred and forty acres could use them in entering that amount of land in a compact body one mile square, if only he did so through four entries of one hundred and sixty acres each. And, if he had rights the aggregate of which was sufficient, he could in a like way enter a body of land three miles square or even an entire township. See Rev. Stats., §§ 2289, 2304, 2306; *Webster* v. *Luther*, 163 U. S. 331; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 243; *Robinson* v. *Lundrigan*, 227 U. S. 173, 178–179; 3 L. D. 472; 29 L. D. 599 and 643; 30 L. D. 285; 31 L. D. 441; 32 L. D. 418; 33 L. D. 225; 45 L. D. 236, 3d par.; General Circular of 1904, pp. 11, 26–28.

With this understanding of the circumstances in which

the provision was incorporated into the Act of 1903 extending the homestead laws to Alaska, we think the meaning and purpose of the provision are manifest. It is in form a proviso and says "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights. A purpose to prevent the use of these rights in entering a large acreage in a single body hardly could be more plainly expressed. There is nothing in the provision indicating that it is concerned merely with what may be taken by a single entry; and to construe it in that way would make it practically useless, for a large acreage in a single body still could be taken by merely resorting to two or more entries. Besides, the amount of land that could be taken by a single entry had long been limited to one hundred and sixty acres, and of course to say that no greater amount should be taken in a single body by a single entry would add nothing to that limitation. But the provision does not speak of a single entry but only of the amount that may be "entered in any single body," and if it is to have any real effect it must be construed according to the natural import of its words; that is to say, as limiting the amount of land in a compact or single body that may be entered by means of soldiers' additional homestead rights, whether the entering be by one or several entries. We conclude therefore that the provision, while leaving one who holds several rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than one hundred and sixty acres in a compact or single body.

The court in Alaska regarded the provision as sufficiently like that relating to the area of placer mining claims (Rev. Stats., §§ 2330, 2331) to require that it be similarly construed. But we think there is a marked difference between the two provisions. That in the placer mining law says "no location" shall exceed a prescribed

area and it means, as the statute otherwise shows, that no single location shall include more.

The Circuit Court of Appeals was of opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska and not to prohibit the entry of a tract of land of more than 160 acres." In this the court apparently confused the present provision, which operates in the same way in all parts of Alaska, with another and wholly distinct provision, which relates only to entries along the shore. Their independence and the subjects to which they relate are best shown by quoting both in the order in which they appear in the statute, which we do—

"And provided further that no more than one hundred and sixty acres shall be entered in any single body by . . . soldier's additional homestead right."

"*Provided*, That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

There is in this case no question as to what distance along the shore an entry may extend, or as to what space shall be reserved between claims along the shore, but only a question as to whether making separate entries of lands which in point of contiguity and compactness constitute a single body of 319.75 acres is in contravention of the provision first quoted, where both entries are by the same person and are based upon soldiers' additional homestead rights. That question we answer in the affirmative for the reasons before indicated.

It follows that, if the facts be as alleged in the complaint, the second patent was issued in violation of law and the Government is entitled to demand that it be canceled, unless, as is asserted in the brief for the defendants, one of them is a *bona fide* purchaser. The complaint does not show that he is such, and the rule is that this is an

affirmative defense which he must set up and establish. *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403; *Great Northern Ry. Co.* v. *Hower*, 236 U. S. 702, 710.

If the patent is canceled Poland, or his assignee, will be free to exercise the rights with which the patent was obtained (see 6 L. D. 290 and 459), and also to ask repayment under the Act of June 16, 1880, c. 244, 21 Stat. 287, of the fees and commissions paid to the land officers.

Decree reversed.